No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1800

UNITED STATES OF AMERICA, PETITIONER

v.

ONOFRE J. SOTELO and NAOMI SOTELO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,

MYRON C. BAUM,
Acting Assistant Attorney General,

STUART A. SMITH,
Assistant to the Solicitor General,

CROMBIE J. D. GARRETT,
WYNETTE J. HEWETT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

Cases:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinions of the bankruptcy court (App. A, *infra*, pp. 1a-14a) and of the district court (App. B, *infra*, pp. 15a-16a) are not officially reported. The opinion of the court of appeals (App. C, *infra*, pp. 17a-22a) is reported at 551 F.2d 1090.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1977 (App. D, *infra*, pp. 23a-24a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the liability equal to unpaid taxes withheld from employees' wages that is imposed by Section 6672 of the Internal Revenue Code of 1954 upon persons who are required to collect and pay over such taxes but who willfully fail to do so is dischargeable under Section 17 of the Bankruptcy Act.

STATUTES INVOLVED

Section 6672 of the Internal Revenue Code of 1954 (26 U.S.C.) and Section 17 of the Bankruptcy Act (11 U.S.C. 35) are set forth in Appendix E, *infra*, pp. 25a-26a.

STATEMENT

On June 26, 1973, O. J. Sotelo and Son Masonry Inc., a corporation, was adjudicated a bankrupt. Respondents Onofre J. Sotelo and his wife, Naomi Sotelo, served respectively as president (chief executive officer) and secretary of the corporation (App. A, *infra*, p. 1a). Shortly thereafter, on July 5, 1973, respondents were adjudicated bankrupts on their voluntary petitions and their individual bankruptcy proceedings were consolidated (App. A, *infra*, p. 1a). On November 5, 1973, the government filed a claim

in the consolidated cases for $40,751.16 for unpaid taxes withheld from the corporation's employees, penalties, and interest. The government's tax claim was based upon Section 6672 of the Internal Revenue Code of 1954, which imposes personal liability for unpaid withholding taxes upon persons responsible for collecting and paying over taxes withheld from employees' wages, but who wilfully fail to do so (App. A, *infra*, pp. 1a-2a). The Internal Revenue Service thereafter assessed these liabilities.

The bankrupts objected to the claim on the ground that neither was an officer of the corporation responsible for collecting and paying the withholding taxes over to the government (App. A, *infra*, p. 2a). The trustee objected to the government's claim on the ground that the withholding tax liability was a corporate obligation that was not personally guaranteed by the bankrupts (App. A, *infra*, p. 2a). Following a trial of these issues, the bankruptcy court found that respondent Onofre J. Sotelo, in his capacity as chief executive officer and majority stockholder of the corporation, had been responsible to collect and pay over the withholding taxes and was therefore personally liable for the taxes under Section 6672 of the Code. However, the bankruptcy court further found that respondent Naomi Sotelo was not personally liable for the taxes because she had not been responsible for their collection and payment (App. A, *infra*, p. 2a).

On October 2, 1975, the government served a notice of levy on the trustee with respect to $10,000 that had

been set aside as respondent Onofre J. Sotelo's homestead exemption (App. A, *infra*, p. 4a).[1] The trustee thereafter sought an order of the bankruptcy court directing that the homestead funds be paid to the government (App. A, *infra*, p. 4a). However, respondents objected to the payment of the $10,000 to the government on the grounds that the liability for unpaid withholding taxes under Section 6672 was a dischargeable compensatory penalty rather than a tax, and that the homestead exemption belonged to respondent Naomi Sotelo (App. A, *infra*, pp. 4a, 10a). The bankruptcy court held that respondent Onofre J. Sotelo's Section 6672 liability was a non-dischargeable tax under Section 17a of the Bankruptcy Act, and that the homestead exemption belonged solely to him, as the head of the household (App. A, *infra*, pp. 6a-9a, 10a-12a). The district court affirmed on the basis of the opinion of the bankruptcy court (App. B, *infra*, pp. 15a-16a).

The court of appeals reversed. It held that the liability imposed by Section 6672 was a debt that was dischargeable in respondent's personal bankruptcy and was not a non-dischargeable tax (App. C, *infra*, pp. 19a, 22a). In the court of appeals' view, the use of the word "penalty" in Section 6672 to describe the

[1] Prior to the date on which the government filed its claim, the trustee allowed respondent Onofre J. Sotelo a homestead exemption in certain real estate which respondents held as joint tenants (App. A, *infra*, p. 3a). The real estate was sold subject to certain liens, and the trustee set aside $10,000 as Onofre J. Sotelo's homestead exemption (App. A, *infra*, p. 3a).

liability showed that it was not a tax. In so holding, the court acknowledged that its decision conflicted with *Murphy* v. *Internal Revenue Service*, 533 F.2d 941 (C.A. 5), affirming 381 F. Supp. 813 (N.D. Ala.), and those of many lower courts that Section 6672 was a collection device and the liability it imposed equal to unpaid withholding taxes was in fact a non-dischargeable "tax" within the meaning of Section 17a (1) of the Bankruptcy Act (App. C, *infra*, p. 19a).

The court rejected the government's further argument that the liability was non-dischargeable under Section 17a(1)(e) of the Bankruptcy Act, which provides that taxes "which the bankrupt has collected or withheld from others as required by the laws of the United States * * * but has not paid over" shall not be dischargeable. Despite its literal applicability, the court concluded that respondent's Section 6672 liability was dischargeable because it was a "penalty" and not a "tax" and because the corporation and not respondent was required to collect and pay over the withholding taxes in the first instance (App. C, *infra*, pp. 20a-21a).

REASONS FOR GRANTING THE WRIT

In holding that the liability imposed by Section 6672 of the Internal Revenue Code for unpaid withholding taxes is dischargeable in the bankruptcy of the person who willfully failed to pay over such taxes, the court of appeals acknowledged that its decision was in conflict with *Murphy* v. *Internal Revenue Serv-*

ice, 533 F.2d 941 (C.A. 5), affirming 381 F. Supp. 813, 816-817 (N.D. Ala.) (App. C, *infra*, pp. 19a, 22a n. 4). There, the Fifth Circuit held that the liability imposed by Section 6672 was a non-dischargeable debt for taxes within the meaning of Section 17a(1) of the Bankruptcy Act (11 U.S.C. 35 (a)(1)) (App. E, *infra*, pp. 25a-26a). The decision also conflicts with *Lackey* v. *United States*, 538 F.2d 592 (C.A. 4), which likewise held that the Section 6672 liability is a non-dischargeable tax obligation. Thus, the decision below is contrary to those of two other courts of appeals. Resolution of the conflict by this Court is essential in order that there be a uniform national rule with respect to this issue involving the administration of both the Bankruptcy Act and the Internal Revenue Code.

Moreover, the question whether the Section 6672 personal liability for unpaid withholding taxes is dischargeable in the bankruptcy of the person responsible for the collection and payment of such taxes is of substantial fiscal importance. We are advised by the Internal Revenue Service that for the fiscal year 1976, there were $2 billion in withholding tax delinquencies which resulted in assessments under Section 6672 totalling $61 million. Under the decision below, the Internal Revenue Service believes that the collectibility of the major portion of the annual $61 million in withholding tax delinquencies will be jeopardized, since corporate officers will be able to avoid their Section 6672 obligation for corporate withholding taxes by instituting personal bankruptcy proceed-

ings. Indeed, the availability of personal bankruptcy as a shield against Section 6672 liability would mitigate the consequences of failure to pay over withholding taxes and serve to lessen the incentive of corporate officers to collect and pay over such taxes conscientiously. The threat to the integrity of the withholding system posed by the decision below calls for review by this Court.

1. Section 6672 of the Internal Revenue Code of 1954, Appendix E, *infra*, p. 25a, provides that "Any person required to collect * * * and pay over any tax * * * who willfully fails to collect such tax, or truthfully account for and pay over such tax, * * * shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over." The thrust of the statute is to impose personal liability upon those whose control of the financial affairs of a business entity requires them to collect and pay over taxes collected from third parties.

In the typical case, as here, the statute is used as a collection device against corporate officers for the income taxes withheld from their employees' wages. See, *e.g.*, *Monday* v. *United States*, 421 F.2d 1210, 121[illegible]5 (C.A. 7), certiorari denied, 400 U.S. 821; *Gefen* v. *United States*, 400 F.2d 476, 482 (C.A. 5), certiorari denied, 393 U.S. 1119; *Hewitt* v. *United States*, 377 F.2d 921, 924 (C.A. 5); *Burack* v. *United States*, 461 F.2d 1282, 1285 (Ct. Cl.); 8A Mertens, *Law of Federal Income Taxation*, § 47A.25a, pp. 207-

215 Rev. 1971).[2] Thus, except for the present decision, the courts have uniformly recognized that the liability imposed by Section 6672 is a pecuniary burden to insure the collection of unpaid withholding taxes and other taxes that the Code required certain persons to collect from third parties.[3] *Harrington* v. *United States*, 504 F.2d 1306, 1311 (C.A. 1); *Spivak* v. *United States*, 370 F.2d 612, 616 (C.A. 2), certiorari denied, 387 U.S. 908; *Cross* v. *United States*, 311 F.2d 90, 94 (C.A. 4); *Newsome* v. *United States*, 431 F.2d 742, 745 (C.A. 5); *Mueller* v. *Nixon*, 470 F.2d 1348, 1350 (C.A. 6); *Monday* v. *United States*, *supra*, 421 F.2d at 1216; *Kelly* v. *Lethert*, 362 F.2d 629, 633 (C.A. 8); *Bloom* v. *United States*, 272 F.2d 215, 223 (C.A. 9), certiorari denied, 363 U.S. 803.

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[2] While Section 6672 is most frequently asserted against corporate officers, the provision also applies to partners, lenders, and others. See, *e.g.*, *Mueller* v. *Nixon*, 470 F.2d 1348, 1349-1350 (C.A. 6), certiorari denied, 412 U.S. 949 (officer of a second corporation); *Adams* v. *United States*, 504 F.2d 73, 75-76 (C.A. 7) (finance company); *Pacific National Ins. Co.* v. *United States*, 422 F.2d 26, 29-30 (C.A. 9), certiorari denied, 398 U.S. 937 (surety); *Werner* v. *United States*, 512 F.2d 1381, 1382 (C.A. 2) (creditor); *Genins* v. *United States*, 489 F.2d 95, 96 (C.A. 5) (partner).

[3] Thus, apart from an employer's obligation to collect and pay over income taxes withheld from his employees' wages (26 U.S.C. 3402, 3403), he is likewise required to collect and pay over Federal Insurance Contribution Act (social security) taxes (26 U.S.C. 3102(a) and (b)); and Railroad Retirement Act taxes (26 U.S.C. 3202). Furthermore, the Code requires sellers and others to collect and pay over certain excise taxes. See, *e.g.*, 26 U.S.C. 4061 *et seq.*

In holding that respondent's Section 6672 liability was dischargeable in his personal bankruptcy, the court of appeals erroneously refused to apply Section 17a(1)(e) of the Bankruptcy Act (App. E, *infra*, pp. 25a-26a), which controls this case. That provision states that "a discharge in bankruptcy shall not release a bankrupt from any taxes * * * which the bankrupt has collected or withheld from others as required by the laws of the United States * * *." Since respondent had withheld taxes from the wages of his corporation's employees, pursuant to the requirements of 26 U.S.C. 3402, the language of Section 17a(1)(e) directs that the liability imposed by Section 6672 upon an officer of a business entity to pay such taxes is not dischargeable in bankruptcy.

This reading of the statute is confirmed by the pertinent legislative history of Section 17a(1)(e). Prior to the 1966 amendment of Section 17, the Treasury had consistently objected to proposals before Congress that would have made the Section 6672 liability dischargeable in bankruptcy. As the Treasury pointed out, such proposals "would thus discharge or reduce the priority of liabilities resulting not from the bankrupt's failure to pay his own taxes but from his failure to keep intact money which he had obtained from others as a trustee for the Government." H.R. Rep. No. 2535, 85th Cong., 2d Sess. 6 (1958). Congress initially declined to adopt the Treasury's position in favor of non-dischargeability on the belief that the enactment of a criminal penalty (26 U.S.C. 7215) against persons who fail to pay over withhold-

ing taxes would supplement the Section 6672 collection device. See H.R. Rep. No. 2535, *supra*, at 5; S. Rep. No. 1182, 85th Cong., 2d Sess. 1, 2 (1958).

Despite the enactment of the criminal statute, the Treasury continued to press for non-dischargeability in bankruptcy of the obligation to pay withholding taxes in order to enhance the collectibility of such taxes, which "shall be held to be a special fund in trust for the United States" (26 U.S.C. 7501). See H.R. Rep. No. 735, 86th Cong., 1st Sess. 5-7 (1959); H.R. Rep. No. 372, 88th Cong., 1st Sess. 6 (1963). In response, Congress added subsection (e) to Section 17a(1) in 1966. As the House Committee Report stated, its purpose was "to exempt from the provisions of this bill taxes which the bankrupt has collected or withheld from others under Federal or State law." H.R. Rep. No. 372, *supra*, at 1. In the House Committee's view, "* * * the objection of Treasury to the discharge of so-called trust fund taxes has been met by the amendment to this bill." *Id.* at 5. The Senate Reports likewise confirm that the purpose of Section 17a(1)(e) was to render trust fund taxes non-dischargeable in bankruptcy. S. Rep. No. 1134, 88th Cong., 2d Sess. 1, 6 (1964); S. Rep. No. 114, 89th Cong., 1st Sess. 6 (1965).

In light of this legislative history, there is no basis for the court of appeals' conclusion (App. C, *infra*, p. 21a) that Section 17a(1)(e) applies only to the corporate employer and not to the Section 6672 liability of the officer responsible for the collection and payment of withheld taxes. Indeed, there would have

been little reason for Congress to render non-dischargeable the corporate employer's obligation to pay withholding taxes since it was fully aware that for all practical purposes a corporation ceases to exist after a liquidating bankruptcy. See, *e.g.*, H.R. Rep. No. 735, *supra*, at 2; S. Rep. No. 114, *supra*, at 2-3. Thus, in providing for the non-dischargeability of "taxes * * * which the bankrupt has collected or withheld from others," Congress intended that the obligation to pay over such taxes that Section 6672 imposes upon a corporate officer such as respondent survive his personal bankruptcy.

2. The court of appeals also erred in holding that respondent's Section 6672 liability was a dischargeable compensatory "penalty" rather than a non-dischargeable obligation for "taxes * * * legally due and owing by the bankrupt to the United States * * *" within the meaning of Section 17a(1) of the Bankruptcy Act.[4] In so concluding, the court relied upon the use of the word "penalty" in Section 6672 to describe a corporate officer's personal obligation for unpaid taxes withheld from the wages of the corporation's employees.[5] But until the decision below, the courts

[4] Section 17a(1) provides for the non-dischargeability of taxes which became due "within three years preceding bankruptcy." The three-year limitation presents no problem in this case because the withholding taxes were due to be paid in 1971 and 1973 and respondent's bankruptcy petition was filed on July 5, 1973 (App. A, *infra*, p. 1a).

[5] If the court had classified the Section 6672 liability as a non-compensatory penalty, presumably it would have held that the liability was non-dischargeable. Because the purpose of

had uniformly characterized the Section 6672 obligation as a non-dischargeable tax imposed upon persons who should have paid over taxes collected from third persons but who willfully failed to do so. Thus, the liability under Section 6672 "is not a penalty as that term is generally used, but in reality is a liability for a tax originally imposed upon the corporation and shifted to the corporate officer upon his default. Being a tax due from the bankrupt to the United States, this penalty was therefore not dischargeable under Section 17 [footnote omitted]." *Sherwood* v. *United States*, 228 F. Supp. 247, 251 (E.D. N.Y.). Accord: *Murphy* v. *Internal Revenue Service*, 533 F.2d 941 (C.A. 5), affirming 381 F.Supp. 813, 816-817 (N.D. Ala.); *Lynn* v. *Scanlon*, 234 F. Supp. 140, 144-145 (E.D. N.Y.); *Westenberg* v. *United States*, 285 F. Supp. 915, 917 (D. Ariz.). Since Section 6672 is a device to collect what are undisputably taxes, the liability it imposes upon persons responsible for their collection and payment is likewise a non-dischargeable "tax" within the meaning of Section 17a(1). Respondent's liability under Section 6672 is no less a tax liability because his corporation was also liable for the taxes.

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such a penalty is to punish the bankrupt rather than his creditors, penalties are not allowable out of the assets of the bankruptcy estate and are non-dischargeable. See 1A *Collier on Bankruptcy*, ¶¶ 17.05, 17.13 (14th ed.); Bankruptcy Act, c. 541, Section 57j, 30 Stat. 561, as amended (11 U.S.C. 93(j)); *Simonson* v. *Granquist*, 369 U.S. 38. However, compensatory penalties are allowable under Section 57j of the Bankruptcy Act and, as such, are presumptively dischargeable. 8 *Remington on Bankruptcy*, § 3304 (6th ed.).

3. Finally, the court of appeals observed that "[a]s a policy matter, the government's position that [respondent] remains personally liable, notwithstanding bankruptcy, for taxes required to be withheld by his corporation, can lead to substantial inequities" (App. C, *infra*, p. 21a). In the court's view, there is no nexus between the estate of an individual bankrupt corporate officer and the liability of his corporation for unpaid withholding taxes.

But Section 6672 creates the nexus the court believed to be lacking by imposing personal liability for such taxes upon the officer whose preference of other creditors over the government benefitted his corporation in the first instance. Thus, there is no inequity in providing that the corporate officer whose actions resulted in the corporation's withholding tax delinquency cannot eliminate his liability for those taxes by means of personal bankruptcy. Nor do the court of appeals' generalizations concerning the humanitarian policy of the Bankruptcy Act to provide a debtor with a fresh start answer the question whether the liability imposed by Section 6672 is dischargeable under Section 17. As this Court stated in an analogous context in *Bruning* v. *United States*, 376 U.S. 358, 361, "§ 17 is not a compassionate section for debtors * * * [but] demonstrates congressional judgment that certain problems—*e.g.*, those of financing government—override the value of giving the debtor a wholly fresh start [footnote omitted]."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MYRON C. BAUM,
Acting Assistant Attorney General.

STUART A. SMITH,
Assistant to the Solicitor General.

CROMBIE J. D. GARRETT,
WYNETTE J. HEWETT,
Attorneys.

JUNE 1977.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

Bankruptcy No. RI BK 73 233 &
Bankruptcy No. RI BK 73 234

MERGED CASES

[Filed Jan. 23, 1976, Max J. Lipkin,
Bankruptcy Judge]

IN THE MATTER OF

ONOFRE J. SOTELO AND NAOMI SOTELO, BANKRUPTS.

OPINION

Introduction

On June 26, 1973 O. J. Sotelo and Son Masonry Inc., a corporation, was adjudicated a bankrupt. O. J. Sotelo was President and chief executive officer and Naomi Sotelo, his wife, was Secretary.

On July 5, 1973 Mr. & Mrs. Sotelo were adjudicated bankrupts as a result of individual petitions filed by them. These cases were merged by Order of Court on October 12, 1973.

On November 5, 1973 the Internal Revenue Service filed a claim in the amount of $40,751.16 in the merged bankruptcy cases, based on the provisions of Section 6672 of the Internal Revenue Code, which pro-

vides in substance that any person required to collect and pay over any tax imposed by the Internal Revenue Code shall be liable to a penalty equal to the total amount of the tax not paid over.

On March 7, 1974 the Trustee of their estates filed an objection to this claim on the ground that the claim was a claim against the corporation and not personally guaranteed by the bankrupts. The United States of America filed a Motion in Opposition to the Trustee's Objection and moved the Court to enter an Order allowing the government's claim because the claim was predicated upon the statutory liability of Onofre J. Sotelo and Naomi Sotelo pursuant to the provisions of Section 6671 and 6672 of the Internal Revenue Code of 1954.

At the hearing before Judge Covey the bankrupts were represented by their own counsel and the issue raised was that the bankrupts were not responsible officers of the corporation and therefore were not personally liable for unpaid social security and withholding taxes.

On November 29, 1974 Judge Covey allowed the claim of the Internal Revenue Service in the amount of $32,840.71. In his Opinion he found that Onofre J. Sotelo was the chief executive officer, president and majority stockholder of the corporation and was charged with the duty and responsibility to see that the social security and withholding taxes were paid. He further found that Naomi Sotelo was not personally liable for the taxes "as far as the assets of her bankruptcy estate is concerned." The Court continued

and stated "however, this is immaterial because the estates have been merged."

On September 14, 1973 the Trustee allowed Onofre J. Sotelo a $10,000 Homestead in certain real estate occupied by the Sotelo family the title to which was in Onofre J. Sotelo and Naomi Sotelo as joint tenants. The Trustee denied Onofre J. Sotelo's claim of Homestead.

This came about because in the original Schedules filed by the bankrupts each claimed a $5,000 Homestead in the same property.

Since the Sotelo's had a substantial equity in the property the property was sold on March 8, 1974 by the Trustee free and clear of liens. The Order of Sale provided that the liens were to attach to the proceeds of the sale.

On May 1, 1974 a hearing was held to determine the validity, priority and amount of liens against the proceeds of the sale, and on May 7, 1974 the Court found that Kewanee Federal Savings & Loan and Beauty Stain Products had valid liens against the property. Nothing was said in this Order concerning the lien of the United States of America. The balance of the proceeds, including the $10,000 representing Onofre J. Sotelo's Homestead, was held by the Trustee pending the outcome of the litigation concerning the objections to the claim of the Internal Revenue Service.

No action was taken by the Trustee after Judge Covey's Decision on November 29, 1974 to turn the money over to the Internal Revenue Service and on

October 2, 1975 the Internal Revenue Service filed and served a Notice of Levy on the Trustee which stated as follows:

> "This levy is intended to attach to the Homestead Exemption otherwise payable to Onofre J. Sotelo."

On October 24, 1975 the Internal Revenue Service served its final demand on the Trustee and on October 31, 1975 the Trustee filed an Application for an Order directing him to pay the $10,000 proceeds of the Homestead Exemption set off by the Trustee to Onofre J. Sotelo to the Internal Revenue Service.

The Application was set for hearing on December 12, 1975. At the hearing, new counsel for Mrs. Sotelo appeared and asked leave to file a Brief with the Court. Leave was given and the matter was taken under Advisement.

THE ISSUES

Mrs. Sotelo contends (1) that she is entitled to the entire $10,000 Homestead because her husband could not deprive her of her Homestead; (2) since the 1970 Illinois Constitution provides in Article I, Sec. 18, that "the equal protection of the law shall not be denied or abridged on account of sex * * *", that she is entitled to the Homestead; and (3) that the claim of the Internal Revenue Service was based on a tax on the corporation and not on the bankrupt O. J. Sotelo, and therefore it is discharged in bankruptcy.

STATEMENT OF FACTS

The facts are undisputed.

In the Statement of Affairs signed by O. J. Sotelo in the corporate bankruptcy he stated that he had been engaged in business as an individual proprietor between 1962 and October 28, 1970 when he caused the business to be incorporated in the State of Delaware.

In the Statement of Affairs in his individual bankruptcy Mr. Sotelo states that he was a self-employed masonry contractor and that his business was incorporated in 1970. He further stated that his income for the years 1971 and 1972 amounted to approximately $15,000 each year.

In the Statement of Affairs in Mrs. Sotelo's individual bankruptcy she stated that she was a "housewife", and that her income during the years 1971 and 1972 amounted to approximately $3,370.00 each year.

In Schedule B-4 of his Bankruptcy Schedules, for the purpose of claiming $1,000 personal property exemption, Mr. Sotelo stated that he was the head of a household consisting of himself, his wife, and four children. In her Schedule B-4 Mrs. Sotelo claimed $300 personal property exemption.

Chapter 52, Sec. 13 Illinois Revised Statutes provides for Personal Property Exemptions of $300 worth of property to be selected by the debtor and, in addition, when the debtor is the head of the family and resides with the same he shall be entitled to an additional $700 worth of property as exempt.

In each of their schedules each claimed a $5,000 Homestead pursuant to Chapter 52, Sec. 1 Illinois Revised Statutes. This Statute gives a $10,000 Homestead to "every householder having a family."

On August 13, 1973 Onofre J. Sotelo filed an Application to Amend his Schedules in order to claim a $10,000 Homestead Exemption instead of $5,000 and on September 12, 1973 he filed an Amendment to his Schedules claiming a Homestead of $10,000 pursuant to the provisions of Section 1 of Chapter 52 Illinois Revised Statutes. Two days later, on September 14, 1973, the Trustees set aside the Homestead to him.

DISCUSSION

Homestead

In her Brief Naomi Sotelo contends that the Illinois Statute allowing a Homestead Exemption is more than an exemption but is actually an estate in land, and that therefore the action of Mr. Sotelo claiming the entire homestead does not deprive her of her rights. The cases cited in her Brief are inapposite. In this regard the statement is made, without citation of authority, that because of the tax claim the entire Homestead Exemption vests in the wife and should be paid to her instead of his creditors. This is a spurious argument and is of no merit.

The right of Homestead is ineffective as against federal tax liens and levies regardless of whether it is described under state law as an exemption or a property interest. *In Herndon* v. *United States*, 501 F.2d 1219 (8th Cir. 1974), the Court stated at pages 1222-23:

> "We think the sounder view in this area of conflicting approaches is that state exemption laws —even if the state, through case interpretation, statute, or constitutional provisions, characterizes its homestead exemption statute as creating a present property interest—do not preclude the United States from levying upon and selling the taxpayer's interest in the property."

Int. Rev. Code of 1954, Sec. 6334, after listing property (not including homesteads) exempt from levy for federal taxes specifically states that notwithstanding any other law of the United States, no property or rights to property shall be exempt other than the property specifically listed in that section.

Mrs. Sotelo has no Homestead in the property under the law of Illinois and of his [*sic*] District. The law in this District is settled by the Opinion of Judge Robert D. Morgan in the case in *In re Hendricks*, 300 F. Supp. 774 (1969). In that case Mr. & Mrs. Hendricks were adjudicated bankrupts. On the date of bankruptcy they owned a residence in Victoria, Illinois as joint tenants. In their Schedules each claimed a $5,000 Homestead Exemption in said real estate pursuant to the provisions of Chapter 52, Sec. 1 Illinois Revised Statutes. The Trustee filed a petition, in each case, requesting the Court to determine the proper allowance and allocation of the Homestead exemption. The Court held that the law is clearly established in Illinois that where a husband and wife own property as joint tenants and reside together on

the premises that the husband is the householder contemplated by the Statute and he alone is entitled to the Homestead Exemption.

The Court relied on several cases. One case is *Morris Investment Co.* v. *Skeldon*, 399 Ill. 506, where the Supreme Court of Illinois held that the husband's interest as householder extends to the entire property, not just to his undivided interest.

Other cases cited by Judge Morgan are *Johnson* v. *Muntz*, 364 Ill. 482, (1936) and *DeMartini* v. *DeMartini*, 384 Ill. 124 (1944).

In order for a wife to be the head of a family or "householder" for the purposes of Homestead laws, where there is a husband, she must in fact be the controlling or supporting force in the family and there must be dependence upon her by the family. *First National Bank & Trust Co. of Rockford* v. *Sandifer*, 121 Ill. App.2d 479 (1970).

Ordinarily, the husband, if living, and residing with his family, is the householder contemplated by the Homestead Act so as to vest a Homestead Estate in him, even though the premises of which they reside are owned by both husband and wife as joint tenants. 20 I.L.P. Homestead Sec. 25, *LaPlaca* v. *LaPlaca*, 5 Ill.2d 468 (1955), *DeMartini* v. *DeMartini*, *supra; Johnson* v. *Muntz*, *supra*.

Separate homesteads in favor of different persons cannot exist in the same premises at the same time. 29 I.L.P. Homestead Sec. 6, *LaPlaca* v. *LaPlaca*, *supra; Morris Investment Co.* v. *Skeldon*, *supra; Johnson* v. *Muntz*, *supra*.

Under proper circumstances, a wife, although living with her husband, may be the householder in whom the Homestead Estate is vested. *DeMartini* v. *DeMartini*, 386 Ill. 128 and *First National Bank* v. *Sandifer*, *supra*.

In this case it is clear that Mr. Sotelo was the householder, he was the head of the family, he was supporting the family, they were dependent upon him for support and they were not dependent on Mrs. Sotelo for support and she was not the householder entitled to a Homestead Exemption.

THE FEDERAL LIEN

The Federal Statutes grant a lien in favor of the United States "upon all property and rights to property" belonging to any person for unpaid delinquent federal taxes. The collector of Internal Revenue, or his deputy is authorized to enforce the collection of the delinquent and unpaid taxes by levying upon "all property and rights to property except those specifically exempted by Federal Statutes." Sections 6331 and 6334 of the Internal Revenue Code of 1954 (26 U.S.C. 6326, 6331, 6334). Homesteads are not specifically exempt by said statutes and therefore are subject to the lien of the federal tax and the levy.

Once the state law has been applied to ascertain the taxpayer's state-created property interest, to govern the determination of the taxpayer's interest in the property to which the lien attaches, we enter the province of federal law in subjecting the property in-

volved to the discharge of the tax liability. *United States* v. *Bess*, 357 U.S. 51; *Aquillino* v. *U.S.*, 363 U.S. 509.

Since Mrs. Sotelo does not have a Homestead in the property and Mr. Sotelo does have a Homestead in the property the lien of the Federal Government attaches to the $10,000 proceeds in the hands of the Trustee.

DISCHARGEABILITY

The contention is made that the tax is not a tax on Onofre J. Sotelo but it is in the nature of a compensatory penalty, and therefore nondischargeable.

The basis for this argument is not specifically set forth. The taxpayer admits that in *Sherwood* v. *United States*, 228 F.Supp. 247, and *Westenberg* v. *United States*, 285 F.Supp. 915, the Courts held that the penalty under Section 6672 of the Internal Revenue Code is not dischargeable in bankruptcy.

Mrs. Sotelo fails to make any reference to the pertinent statutory provisions. Section 17 of the Bankruptcy Act (11 U.S.C. Sec. 35) relates to debts not affected by a discharge. It first provides that debts not affected by a discharge are taxes which became legally due and owing by the bankrupt to the United States within three years preceding the bankruptcy. It also provides in subparagraph a(1) (e) that taxes are not dischargeable which the bankrupt has collected or withheld from others as required by the laws of the United States but has not paid over such taxes. It also provides that a dis-

charge shall not be a bar to any remedies available under applicable law to the United States against the exemption of the bankrupt allowed by law and duly set apart to him under this Act. In addition to these provisions the Act also states that a discharge in bankruptcy shall not release or affect any tax lien.

Section 57j of the Bankruptcy Act (11 U.S.C. Sec. 93) provides in substance that debts owing the United States as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the transaction out of which the penalty or forfeiture arose.

As stated in *1A Collier on Bankruptcy* 14th Edition, Section 17.13, pages 1609 and 1610, although the Bankruptcy Act does not make specific provisions concerning the dischargeability of fines and penalties due to the United States certain principles have become well settled in this connection. Thus, fines and penalties are not affected by a discharge.

As stated by the author in *1A Colliers* at page 1623 with reference to the survival of tax claims against exempt property the author cites the case of the *United States* v. *Bess*, 357 U.S. 51, which holds that generally speaking federal tax claims are not subject to state exemption laws.

Finally it should be noted that the tax involved is not a "penalty". Though denominated a "penalty" it is in substance a tax. *Kelly* v. *Lethert*, 362 F.2d 629, *Braden* v. *United States*, 442 F.2d 342, cert. denied 404 U.S. 912. It has also been described as imposing a civil liability. *United States* v. *Industrial*

Crane and Manufacturing Corp., 492 F.2d 772, *Cash* v. *Campbell*, 346 F.2d 670.

In view of the foregoing authorities there is no merit in the bankrupt's contention that the tax has been discharged.

CONSTITUTIONAL VIOLATION

In connection with the argument that Mrs. Sotelo does not have any Homestead because her husband was not dependent upon her for support she now contends that this "male chauvinist" argument has absolutely no validity. The United States Supreme Court she claims has spoken repeatedly on the issue that sex is a suspect classification, and must have some rational basis to be upheld.

As indicated above the Homestead Exemption Law Act of the State of Illinois does not distinguish rights based on sex. The difference in who is entitled to a Homestead depends on who is the person supporting the family whether it be a male or a female.

Chapter 52 Section 1 Illinois Revised Statutes creates a Homestead for "every householder having a family." It does not state that it is every male householder. Section 2 of this Act provides that the Homestead continues after the death of such householder for the benefit of the "husband or wife surviving." Section 4 of the Act provides that a conveyance of a Homestead must be signed by the householder and "his or her spouse if he or she have one."

Section 13 of Chapter 52 relating to Exemptions of Personal Property provides that the "debtor" may

select $300 worth of property, and in addition, when the "debtor" is the head of the family and resides with the same he or she may have an additional $700 exemption.

At common law there was no such thing as a Homestead Right. Homestead Rights, therefore, exist only by virtue of constitutional or statutory rights creating them. 40 C.J.S. Homestead Sec. 2.

The exemption of property of a debtor from liability for the payment of his debts is purely a statutory right. 19 I.L.P. Exemptions Sec. 2.

"Homestead" is wholly statutory and the elements may be changed by the Legislature. *Petruluonis* v. *Dudek*, 113 Ill. App.2d 398, 252 N.E.2d 23, 20 I.L.P. Homestead Sec. 2.

It is interesting to note that if Mrs. Sotelo's position is correct namely that this law is unconstitutional this would be of no benefit to her because there would be no homestead laws on the books of the State of Illinois. The general rule is that a statute declared unconstitutional is null and void. 16 CJS Constitutional Law Sec. 101.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Statement of Facts contained herein shall constitute Findings of Fact under Rule 752 of the Bankruptcy Rules and the discussion of the legal propositions in the foregoing Discussion shall constitute

Conclusions of Law under Rule 752 of the Bankruptcy Rules.

DATED at Peoria, Illinois, this 23rd day of January, 1976.

/s/ Max J. Lipkin
MAX J. LIPKIN
Bankruptcy Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

No. RI BK 73 233 & No. RI BK 73 234

MERGED CASES

[Filed Feb. 23, 1976, William J. Littell, Clerk]

IN RE

ONOFRE J. SOTELO AND NAOMI SOTELO, BANKRUPTS.

DECISION AND ORDER ON APPEAL

This is an appeal from an Order of the Bankruptcy Judge, directing the trustee of the merged estates herein to pay to the Internal Revenue Service the sum of $10,000, representing the proceeds of a homestead exemption previously set off by the trustee to Onofre J. Sotelo. It is contended by the bankrupts that such exemption, failing in the husband Onofre against the government claim, is available to the wife, Naomi.

This court has read and considered the entire record on appeal, including all arguments of counsel in briefs. While the arguments of the bankrupts' counsel may be considered ingenious and vigorous representation of the clients' financial interests, it becomes apparent, upon objective consideration, that they have all been discussed and decided correctly

under the applicable laws in the Opinion filed herein by the Bankruptcy Judge on January 23, 1976. Further hearing thereon or discussion here would serve no useful purpose.

Accordingly, IT IS ORDERED that the Order of the Bankruptcy Judge herein filed January 23, 1976, is AFFIRMED on appeal in this court.

/s/ Robert D. Morgan
ROBERT D. MORGAN
United States District Judge

Entered: February 23, 1976

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 76-1429

IN THE MATTER OF ONOFRE J. SOTELO and NAOMI SOTELO, Bankrupts.

Appeal in Bankruptcy from the Order of the United States District Court for the Southern District of Illinois, Northern Division

Nos. RI-BK-73-233 and RI-BK-73-234

Robert D. Morgan, *Judge.*

HEARD DECEMBER 3, 1976—DECIDED MARCH 24, 1977

Before BAUER, WOOD, *Circuit Judges*, and GRANT, *Senior District Judge.**

BAUER, *Circuit Judge.* Appellant Onofre J. Sotelo contends that the district court erred in not discharging in bankruptcy a liability imposed upon him under 26 U.S.C. § 6672 for failing to account to the government for taxes withheld from the wages of the employees of the corporation of which he was chief executive officer. The question on review is whether

* The Hon. Robert A. Grant, United States District Court for the Northern District of Indiana, is sitting by designation.

the liability is a nondischargeable tax or a dischargeable penalty.

Sotelo does not challenge his liability under 26 U.S.C. § 6672.[1] He only argues that the liability should have been discharged by his personal bankruptcy petition. Sotelo bases has argument on Section 17 of the Bankrupty Act, 11 U.S.C. § 35, which provides in pertinent part:

> "§ 35. Dischargeability of debts—Debts not affected by discharge
>
> (a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy: *Provided, however*, That a discharge in bankruptcy shall not release a bankrupt from any taxes . . . (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over . . . ."

[1] "§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable."

The Bankruptcy Judge proved and allowed Sotelo's liability. The liability thus is dischargeable under Section 17 unless it is a "tax . . . legally due and owing by the bankrupt to the United States." Sotelo maintains that his liability cannot be a nondischargeable "tax" because 26 U.S.C. § 6672 calls it a "penalty." Under his view, only the employer corporation obligated to withhold the funds is liable for a "tax." 26 U.S.C. § 3402.

The government recognizes that Section 6672 explicitly imposes a "penalty" rather than a "tax", but relies on an uncontroverted line of cases that repudiate the statutory language and hold that a Section 6672 liability is a nondischargeable tax for bankruptcy purposes. *In re Murphy*, 533 F.2d 941, 942 (5th Cir. 1976), *aff'g In re Murphy*, 381 F.Supp. 813 (N.D. Ala. 1974); *Westenberg* v. *United States*, 285 F.Supp. 915 (D. Ariz. 1968); *Lynn* v. *Scanlon*, 234 F.Supp. 140 (E.D.N.Y. 1964); *Sherwood* v. *United States*, 228 F.Supp. 247 (E.D.N.Y. 1964).

Notwithstanding this contrary precedent, we reverse the district judge and hold the liability to be a dischargeable debt.

All the cases cited by the government rely on *Botta* v. *Scanlon*, 314 F.2d 392 (2d Cir. 1963), which holds that the liability imposed under Section 6672 is a "tax" within the meaning of the Internal Revenue Code's Anti-Injunction Statute, applicable to suits brought to restrain "the assessment or collection of any *tax*" (emphasis added). 26 U.S.C. § 7421(a).[2]

[2] 26 U.S.C. § 7421(a) provides in full:

"(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the

The *Botta* court based its decision on Section 6671 of the Internal Revenue Code. Section 6671 mandates that

> "any reference in this title [which includes the Anti-Injunction Statute] to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter [which includes Section 6672]."

No provision equivalent to Section 6671 applies to references to "taxes" in the Bankruptcy Act. *Botta's* holding that a Section 6672 "penalty" is a "tax" for purposes of the Anti-Injunction Statute, premised as it is on the clear language of Section 6671, cannot be extended to the bankruptcy context.

The government's cases support their result by explaining that Section 6672

> "is not a penalty as that term is generally used, but in reality is a liability for a tax originally imposed upon the corporation and shifted to the corporate officer upon his default." *Sherwood* v. *United States, supra* at 251.

More a characterization than an analysis, this rationale is insufficient to override Congress' own characterization of the liability it created in Section 6672.

The government's alternative ground, 11 U.S.C. § 35(a)(1)(e), suffers from the same disability as

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purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

its primary ground. Section 35(a)(1)(e) provides that

> "a discharge in bankruptcy shall not release a bankrupt from any taxes . . . which the bankrupt has collected or withheld from others as required by the laws of the United States . . . but has not paid over. . . ."

This proviso was enacted to make withholding taxes collected by the bankrupt but not paid over to the government nondischargeable no matter how long past due. Without it, Section 35(a)(1) would discharge all such taxes except those "due . . . within three years preceding bankruptcy." H.R. Rep. No. 687, 89th Cong., 1st Sess. 1, 5-6 (1965). Because the proviso renders only "taxes" nondischargeable, not a "penalty" imposed under 26 U.S.C. § 6672, it cannot be applied to Sotelo's liability. Moreover, Section 35 (a)(1)(e) applies only to taxes "which the bankrupt has collected or withheld from others as required by the laws of the United States", and it was not Sotelo himself, but his employer-corporation, that was obligated by law to collect and withhold the taxes governed by the proviso. 26 U.S.C. § 3402.

As a policy matter, the government's position that Sotelo remains personally liable, notwithstanding bankruptcy, for taxes required to be withheld by his corporation, can lead to substantial inequities. When an individual remains personally liable after bankruptcy for his own taxes, there is at least some connection between the amount of the liability and the sum of his taxable assets. This nexus is absent when

an individual is held liable for a tax owed by a corporation. The corporate liability might vastly exceed the individual's present or future resources. Indeed, the bankrupt's entire future earnings could be confiscated to compensate for the corporate liability, a result that would contravene the Bankruptcy Act's basic policy of settling a bankrupt's past debts and providing a fresh economic start. Declining to bring about such a possibility, we hold the Section 6672 liability dischargeable in bankruptcy.[3]

Any uncertainty created by the conflict between our holding and established precedent, albeit not binding precedent, seems a low price to pay for achieving the basic purpose of the Bankruptcy Act by respecting the statutory language of the Act and the Internal Revenue Code.[4]

REVERSED and REMANDED.

A true Copy:
Teste:

____

Clerk of the United States
Court of Appeals for
the Seventh Circuit

[3] By so holding, we need not consider Sotelo's alternative argument that Mrs. Sotelo is entitled to a state homestead exemption free from her husband's Section 6672 liability.

[4] This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing in banc on the question of the conflict with the Fifth Circuit's holding in *In Re Murphy*, 533 F.2d 941 (1976).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

March 24, 1977

Before

Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

No. 76-1429

IN THE MATTERS OF:

ONOFRE J. SOTELO and NAOMI SOTELO, Bankrupts.

Appeal from the United States District Court
for the Southern District of Illinois,
Northern Division

Nos. RI-BK-73-233 and 234

Robert D. Morgan, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Northern Division, and was argued by counsel.

* Honorable Robert A. Grant, Senior Judge, United States District Court for the Northern District of Indiana, sitting by designation.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and REMANDED, in accordance with the opinion of this court filed this date.

APPENDIX E

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

Bankruptcy Act, c. 541, 30 Stat. 544, Sec. 17 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840, 851] (11 U.S.C. 35):

Sec. 17. *Debts not affected by a discharge.*

a [as amended by Sec. 2, Act of July 5, 1966, P.L. 89-496, 80 Stat. 270]. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy: *Provided, however,* That a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed

to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this Act: *And provided further*, That a discharge in bankruptcy shall not release or affect any tax lien;

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE; 1977 236791 17

No. 76-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA,

Petitioner,

vs.

ONOFRE J. SOTELO and NAOMI SOTELO,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRUCE L. BALCH
KATZ, MCANDREWS, DURKEE & TELLEEN
200 Cleaveland Building
P.O. Box 66
Rock Island, Illinois 61201
Telephone: (309) 788-5661
Counsel for the Respondents

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The undersigned, on behalf of the respondents, hereby submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

QUESTION PRESENTED

The respondents disagree with the statement of the question presented in the government's petition. (Petition, p. 2). Respondents submit that the question presented is more properly stated as: Whether the personal liability for the penalty assessed under Section 6672 of the Internal Revenue Code is discharged by the personal bankruptcy of the individual.

STATEMENT

The respondents submit that the statement in the petition omits the relevant fact that on November 29, 1974, the claim of the Internal Revenue Service for unpaid *corporate* taxes was proved and allowed for $32,840.71 in the *personal* bankruptcy. (Petition, App. A, p. 2a).

REASONS FOR NOT GRANTING THE WRIT

The petition intermingles a discussion of the advisability of granting the writ with an argument on the merits of the case. Respondents suggest that these two subjects be separately considered.

I. The Advisability Of Granting The Writ.

The petition claims that in fiscal 1976 a total of $61 million was assessed against individuals under Section 6672, and that a major portion would be jeopardized if the writ is not granted. We dispute that the case is of that degree of fiscal importance because, of the amount collected, most would be collected whether or not the obligation is dischargeable in bankruptcy.

Many persons assessed this penalty are people of means, who, once their liability is established, pay the assessment. Others are persons who are or become impoverished, dead, or not found, so that the question of legal liability is irrelevant to any actual collection. Others are partners or sole proprietors of the underlying business activity, so that their personal liability is direct and not dependent on the formality of an assessment under Section 6672.

The petition erroneously assumes that legal liability is the equivalent of collection, and ignores the inevitable loss caused by persons who cannot pay under any circumstances. The petition also erroneously assumes that everyone assessed under Section 6672 is a person with no assets, who will immediately file a personal bankruptcy, and who, after bankruptcy, miraculously acquires sufficient assets to pay the claim in full. It also ignores the fact that the underlying business entity often

has assets which pay the tax itself, in whole or in part, thereby relieving the individual *pro tanto*.

In many cases more than one individual may be responsible for the penalty, and the government may pursue all of them. See 29 Tax Lawyer 621 (Spring 1976), Appendix A, *infra*, p. 1a. In such cases, bankruptcy of one person would not affect the ability of the government to collect from another.

The question presented is one of statutory construction needed to harmonize conflicting provisions of the Bankruptcy Act and the Internal Revenue Code. Both statutes are written in an atmosphere of great social and economic pressure, and are the products of peculiarly political processes. We suggest that the better course is for Congress to resolve this conflict, rather than the Court.

An example of the Congressional process we recommend took place in *United States v. Byrum*, 408 U.S. 125. This Court interpreted the term "enjoyment" of property as used in 26 U.S.C. sec. 2036(a), and held that a decedent who retained voting rights to stock transferred to an inter vivos trust did not retain "enjoyment" of the property. This decision involved a highly technical area of estate taxation and Congress reacted to it by amending this section in the Tax Reform Act of 1976, P.L. 94-455 (26 U.S.C. 2036(a), (App. B, *infra*, p. 2a). An additional sentence was added to the section which specifically provided that "the retention of voting rights in retained stock shall be considered to be a retention of enjoyment of such stock." Such congressional action bears out Mr. Justice Powell's observation that, "When a principle of taxation requires re-examination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences." *United States v. Byrum*,

408 U.S. 125, at 135. We predict a similar Congressional reaction to the case at bar, regardless of how it might be decided on its merits.

Presented with the acknowledged conflict between the Courts of Appeal, Congress may well clarify its intention, rendering a decision by this Court unnecessary. In making the choice, it will be useful to Congress to have legislative facts available to observe what effect the differences between the Circuits have on revenue. The Seventh Circuit, according to the 1970 Census, had a population of 20,725,578 out of a total population of the United States of 203,184,772. The position of the government has been challenged in a geographical area containing about 10% of the national population. This will produce a representative sample of experience for Congress to evaluate without creating an undue risk.

If, after a reasonable time, Congress does not act, and the Court determines that a national rule is needed on the point involved, certiorari can be granted in some future case. The nature of the problem is such that it will inevitably arise in future cases. When it does, and if the Court determines that the matter is really as serious as the government would lead us to believe, and if Congress has not resolved the question, then certiorari can be granted and the merits decided by this Court.

II. The Merits Of The Case.

The bankrupt in this case has received his discharge in bankruptcy, which discharges him from all provable debts except those which are specifically classed as nondischargeable by statute. The claim of the Internal Revenue Service in this case was proved and allowed by the Bankruptcy Judge. "Provable debts are presump-

tively dischargeable, and the burden of showing that a particular liability is within one of the statutory exemptions, as against an assertion of release by discharge in bankruptcy, is on the creditor." 8 *Remington on Bankruptcy*, § 3315, lists cases upholding this theory. The applicable statute is 11 U.S.C. 35(a) which provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as are *taxes* which became legally due and owing by the bankrupt to the United States . . ." [emphasis supplied].

Upon close examination of this situation, it can be seen that the underlying tax involved was not a tax on the bankrupt, but rather was a tax on the corporation. Care must be taken to distinguish the *personal liability* of the bankrupt for a penalty based on the corporate tax, from the question of the *dischargeability* of that personal obligation, which is the question presented.

The fact that a person is liable to pay the taxes of another does not of itself give rise to a non-dischargeable debt. 8 *Remington on Bankruptcy*, § 3317. We submit that the liability of the bankrupt for a penalty based on the tax of the corporation is not a *tax* on him, but is a compensatory penalty. It is a penalty because the statute itself says the responsible person shall "be liable to a *penalty* equal to the total amount of the tax . . . not . . . paid over." (26 U.S.C. 6672) [emphasis supplied]. It is compensatory because the only purpose of the personal liability involved is to collect money owed, and its payment reduces the related tax *pro tanto*.

The question as to whether the penalty is compensatory or punitive in nature goes to the question of whether or not it is dischargeable in bankruptcy. 8 *Remington on Bankruptcy*, § 3304. Compensatory penalties are dischargeable while punitive penalties are not. For this reason, non-dischargeable punitive penalties are not allowed to share in the assets of the bankrupt estate, because the punishment would then fall on the other creditors, rather than the bankrupt. We specifically point out that the government's claim was proved and allowed in this case, and therefore shares in both the personal and corporate assets.

Many reported cases characterize the penalty imposed by Section 6672 as a "tax" although the statute itself says "penalty". The government cites a group of cases for this characterization, such as *Kelly v. Lethert*, 362 F.2d 629 (C.A. 8, 1966). These cases involve determination of *liability* rather than *dischargeability*, so the distinction between "tax" and "penalty" is not crucial to these decisions.

The entire line of authorities cited in the petition for the idea that "penalty" equals "tax" can be traced back to *Botta v. Scanlon*, 314 F.2d 392 (C.A. 2, 1962). The holding there was that "penalty" equals "tax" for the purpose of the anti-injunction provisions of the Internal Revenue Code. (26 U.S.C. 7421(a), Appendix C, *infra*, p. 3a).

The *Botta* court correctly based its decision on Section 6671 of the Internal Revenue Code (26 U.S.C. 6671, App. D, *infra*, p. 3a) which provides:

> "any reference in this title [which includes the Anti-Injunction Statute] to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter [which includes Section 6672]."

No provision equivalent to Section 6671 applies to references to "taxes" in the Bankruptcy Act. *Botta's* holding that a Section 6672 "penalty" is a "tax" for

purposes of the Anti-Injunction Statute, premised as it is on the clear language of Section 6671, should not be extended to the bankruptcy context.

Shortly after *Botta* was decided, it was misinterpreted as applicable to a bankruptcy situation. *Sherwood v. United States*, 228 F.Supp. 247 (E.D., N.Y. 1964). All of the cases thereafter decided on the point in question then relied on *Botta*, interpreted by *Sherwood*. Until the Court of Appeals for the Seventh Circuit decided the case at bar with a full analysis of the question, there were no decisions giving any reasoned analysis for repudiating the statutory characterization Congress put on the personal liability.

The two appellate decisions contrary to the case at bar are *per curiam* affirmances. *Murphy v. Internal Revenue Service*, 533 F.2d 941 (C.A. 5) affirming 381 F.Supp. 813 (N.D.Ala.) and *Lackey v. United States*, 538 F.2d 592 (C.A.4). Both of these cases rely on the District Court opinion in *Murphy* as their basis. In the course of that District Court opinion, the observation is made:

> ". . . the plight of the bankrupt is one that naturally incites sympathy and tends to provoke compassion. The purpose of bankruptcy to give the bankrupt a new start in life and to free him from the burden of his debts is frustrated by a proceeding which does not discharge him from paying taxes created by a corporate enterprise which ended in financial disaster and in his own personal financial ruin."

In spite of such language, the District Court in *Murphy* refused a discharge on the authority of *Botta*, which, as mentioned, was not a bankruptcy case.

The petition argues that permitting bankruptcy to discharge penalties assessed under Section 6672 would lessen the incentive for corporate officers to do their

duties conscientiously (Petition, p. 7). This argument is illusory. If a corporation goes bankrupt, its stock becomes worthless; and when a corporate officer goes bankrupt, all his non-exempt property is lost. There is no profit to a corporate officer discharged from liability for Section 6672 penalties, and no financial incentive to attain such a miserable circumstance. The former corporate officer in this situation is ruined financially whether discharged or not. The denial of the discharge means that a further continuing liability is created unrelated to property, earning ability, health, or any other relevant criteria. We submit that such a drastic conclusion should be reached only if specifically directed.

To eliminate the fraudulent use of bankruptcy for the avoidance of personal liability for the Section 6672 penalty, the government can rely on the exception which make nondischargeable any debts which were created by ". . . fraud, embezzlement, misappropriation, or defalcation while acting as an officer . . ." (11 U.S.C. 35(a)(4)). There is also criminal liability as mentioned in the petition. (Petition, p. 9).

The petition resorts to legislative history to sustain its characterization of the personal obligation. Legislative history is not needed to sustain the characterization obtained from the words of Section 6672 itself, which says this is a "penalty". There is no ambiguity for which reference to legislative history is needed. The various legislative historical papers cited, however, all refer to the discharge of *taxes of the bankrupt*, and there is no reference to show that Section 6672 penalties are taxes for this purpose.

The policy of the Bankruptcy Act gives debtors a fresh start is an overriding consideration when balanced against the non-dischargeability of certain debts. It is

clear that Congress intended that the liability of certain persons for their own individual taxes would not be dischargeable. It is also clear that Congress intended that persons holding certain corporate positions would be personally liable to see that certain taxes of the corporation are paid. It does not necessarily follow, however, that the derivative liability of the corporate officer is non-dischargeable. That liability is simply a suretyship relationship between the government and the individual in which the individual simply owes a debt to the government.

When people are held liable for their own taxes, there is some rational connection between the liability and the assets which were or are owned by the individual. This nexus is absent when someone is held liable for a corporate tax. The vicarious liability for the corporate tax might be vastly in excess of the resources owned, or whichever could be owned, by the hapless individual. It is bad enough to take personal assets for corporate debts, but it is unreasonable to confiscate all future earnings of a bankrupt for the loss of assets which were never his. A fundamental policy of the Bankruptcy Act is subverted unless the individual discharged is permitted to rehabilitate himself and his family out of future earnings.

If Congress had intended to impose a tax under Section 6672, then words imposing a tax would have been utilized; but that section does not impose a tax. It imposes a compensatory penalty personally chargeable to an individual. If it is a compensatory penalty it is dischargeable in bankruptcy.

Ours is a society where private risk of capital is rewarded and encouraged. Although it is essential that the government be financed, it is also essential that in-

dividuals be permitted to start anew if their personal fortune has been risked and lost. Imposing permanent economic servitude on the unfortunate corporate officer whose employer has failed may well be within the power of Congress, but such a harsh result should not be presumed in the absence of a clear congressional mandate.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Bruce L. Balch
Katz, McAndrews, Durkee & Telleen
200 Cleaveland Building
P.O. Box 66
Rock Island, Illinois 61201
Telephone: (309) 788-5661
Counsel for the Respondents

July 28, 1977

APPENDIX A

29 Tax Lawyer 621 (Spring 1976):

11. *Employment Tax Penalties: Collection Procedure*

Section 6672 imposes a 100 percent penalty for nonpayment of employment and withholding taxes against any person responsible for the payment of these taxes. To ensure collection, the policy of the Service is to assess the full penalty against all responsible persons. Until recently, it was extremely difficult for taxpayers and Service personnel alike to ascertain whether all or a portion of the penalty had previously been paid by one of the other responsible persons. As a result, the same penalty could be paid two or three times.

It is understood that the Service, in an effort to prevent multiple payments, is initiating a new procedure to centralize and coordinate collection of employment tax penalties.

APPENDIX B

Internal Revenue Code of 1954 (26 U.S.C.)

Section 2036(a)

(a) *General Rule.* The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

For purposes of paragraph (1), the retention of voting rights in retained stock shall be considered to be a retention of the enjoyment of such stock.

The Tax Reform Act of 1976, P.L. 94-455, sec. 2009(a), (e)(1):

Added the last sentence to Section 2036(a) of the Internal Revenue Code to read as above, effective for transfers made after June 22, 1976.

APPENDIX C

Internal Revenue Code of 1954 (26 U.S.C.):

Section 7421(a)

"(a) *Tax.* Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6671

(a) *Penalty Assessed As Tax.* The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person Defined.* The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

No. 76-1800

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

ONOFRE J. SOTELO and NAOMI SOTELO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,

M. CARR FERGUSON,
Assistant Attorney General,

STUART A. SMITH,
Assistant to the Solicitor General,

CROMBIE J. D. GARRETT,
WYNETTE J. HEWETT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the bankruptcy judge (Pet. App. A, pp. 1a-14a) and the decision and order of the district court (Pet. App. B, pp. 15a-16a) are not officially reported. The opinion of the court of appeals (Pet. App. C, pp. 17a-22a) is reported at 551 F.2d 1090.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1977 (Pet. App. D, pp. 23a-24a). The

petition for a writ of certiorari was filed on June 7, 1977, and was granted on October 3, 1977 (App. B, *infra*, p. 13a).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the liability equal to unpaid taxes withheld from employees' wages that is imposed by Section 6672 of the Internal Revenue Code of 1954 upon persons who are required to collect and pay over such taxes but who willfully fail to do so, is dischargeable under Section 17 of the Bankruptcy Act.

STATUTES INVOLVED

Sections 3101, 3102, 3402, 3403, 6671, 6672, and 7501 of the Internal Revenue Code of 1954 (26 U.S.C.) and Section 17 of the Bankruptcy Act (11 U.S.C. 35) are set forth in Appendix A, *infra*, pp. 1a-5a.

STATEMENT

On June 26, 1973, O. J. Sotelo and Son Masonry Inc., a corporation, was adjudicated a bankrupt. Respondents Onofre J. Sotelo and his wife, Naomi Sotelo, served respectively as president (chief executive offi-

[1] On October 31, 1977, the Court granted the government's motion to dispense with the requirement of a separate appendix. Accordingly, we have set forth in Appendix B, *infra*, pp. 6a-13a, the docket entries of the lower courts, the notices of appeal to the lower courts, and the order allowing certiorari.

cer) and secretary of the corporation (Pet. App. A, p. 1a). Shortly thereafter, on July 5, 1973, respondents were adjudicated bankrupts on their voluntary petitions and their individual bankruptcy proceedings were consolidated (Pet. App. A, p. 1a).

On November 5, 1973, the government filed a claim in the consolidated individual bankruptcy cases for \$40,751.16[2] for unpaid taxes withheld from the corporation's employees, penalties, and interest. The government's tax claim was based upon respondents' liability as corporate officers under Section 6672 of the Internal Revenue Code of 1954, which imposes personal liability for unpaid withholding taxes upon persons responsible for collecting and paying over taxes withheld from employees' wages, but who willfully fail to do so (Pet. App. A, pp. 1a-2a).

Respondents objected to the claim on the ground that neither was an officer of the corporation who was responsible for collecting and paying over to the government the withholding taxes. The trustee objected to the government's claim on the ground that the withholding tax liability was a corporate obligation that was not personally guaranteed by the bankrupts (Pet. App. A, p. 2a).

Following a trial of these issues, the bankruptcy judge found that respondent Onofre J. Sotelo, in his

[2] The bankruptcy court allowed the government's claim to the extent of \$32,840.71 (Pet. App. A, p. 2a).

capacity as chief executive officer and majority stockholder of the corporation, had been responsible to collect and pay over the withholding taxes and was therefore personally liable for the taxes under Section 6672 of the Code. However, the bankruptcy judge further found that respondent Naomi Sotelo was not personally liable for the taxes because she had not been responsible for their collection and payment (Pet. App. A, p. 2a).

The assets of the bankruptcy estate were insufficient to satisfy the government's tax claim. Accordingly, the government served a notice of levy on the trustee with respect to $10,000 that had been set aside as respondent Onofre J. Sotelo's homestead exemption under state law (Pet. App. A, pp. 3a-4a).[3] The trustee thereafter sought an order from the bankruptcy judge directing that the homestead funds be paid to the government (Pet. App. A, p. 4a). However, respondents objected to the payment of the $10,000 to the government on the ground that the homestead exemption belonged to respondent Naomi Sotelo. Respondents also urged that the liability for unpaid withholding taxes under Section 6672 was a dischargeable compensatory penalty rather than a tax (Pet. App. A, pp. 4a, 10a).

[3] Prior to the date on which the government filed its claim, the trustee allowed respondent Onofre J. Sotelo a homestead exemption in certain real estate which respondents held as joint tenants (Pet. App. A, p. 3a). The real estate was sold subject to certain liens, and the trustee set aside $10,000 as Onofre J. Sotelo's homestead exemption (Pet. App. A, p. 3a). See Smith-Hurd Ill. Ann. Stat., c. 52, Section 1 (1977 Cum. Supp.).

The bankruptcy judge held that respondent Onofre J. Sotelo's Section 6672 liability was a non-dischargeable tax under Section 17a of the Bankruptcy Act, and that the homestead exemption belonged solely to him, as the head of the household (Pet. App. A, pp. 6a-9a, 10a-12a). The district court affirmed on the basis of the opinion of the bankruptcy judge (Pet. App. B, pp. 15a-16a).

The court of appeals reversed. It held that the liability imposed by Section 6672 was a debt that was dischargeable in respondent's personal bankruptcy and was not a non-dischargeable tax (Pet. App. C, pp. 19a, 22a). In the court of appeals' view, the use of the word "penalty" in Section 6672 to describe the liability of a responsible officer to pay unpaid withholding taxes showed that the government's claim was not for a tax. In so holding, the court acknowledged that its decision conflicted with *Murphy* v. *Internal Revenue Service*, 533 F.2d 941 (C.A. 5), affirming 381 F. Supp. 813 (N.D. Ala.), and those of many lower courts that Section 6672 was a collection device and the liability it imposed equal to unpaid withholding taxes was a non-dischargeable "tax" within the meaning of Section 17a(1) of the Bankruptcy Act (Pet. App. C, p. 19a; see also *id.* at p. 22a n. 4).

The court rejected the government's further argument that the liability was non-dischargeable under Section 17a(1)(e) of the Bankruptcy Act, which provides that taxes "which the bankrupt has collected or withheld from others as required by the laws of the United States * * * but has not paid over" shall not

be dischargeable. The court concluded that Section 17a(1)(e) was inapplicable because respondent's Section 6672 liability was for a "penalty" and not a "tax" and because the corporation and not respondent was required to collect and pay over the withholding taxes in the first instance (Pet. App. C, pp. 20a-21a).[4]

SUMMARY OF ARGUMENT

Section 6672 of the Internal Revenue Code of 1954 provides that "Any person required to collect * * * and pay over any tax * * * who willfully fails to collect such tax, or truthfully account for and pay over such tax, * * * shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over." The purpose of the statute is to impose personal liability upon those whose control of the financial affairs of a business entity requires them to collect and pay over taxes collected from third parties.

The decision of the court of appeals that the liability imposed by Section 6672 for unpaid withholding taxes is dischargeable in the bankruptcy of the person

[4] The court of appeals believed that by holding that the government's tax liability was dischargeable, it did not have to consider respondent Onofore Sotelo's alternative contention that his wife Naomi Sotelo was entitled to a state homestead exemption free from her husband's Section 6672 liability (Pet. App. C, p. 22a, n. 3). However, that conclusion was erroneous. As we shall explain *infra*, pp. 33-34, n. 23, the case must in all events be remanded to the court of appeals to address respondents' homestead argument.

who willfully failed to pay over such taxes is erroneous on two independent grounds.

A.

Section 17a(1)(e) of the Bankruptcy Act bars a discharge of a bankrupt's Section 6672 liability for unpaid withholding taxes. That statute directs that "discharge in bankruptcy shall not release a bankrupt from any taxes * * * which the bankrupt has collected or withheld from others as required by the laws of the United States * * * but has not paid over * * *." The language of Section 17a(1)(e) is explicit and controls this case. Since respondent had withheld but not paid over taxes from the wages of his corporation's employees, pursuant to the requirements of 29 U.S.C. 3402, Section 3402 of the Internal Revenue Code, the liability imposed by Section 6672 upon him to pay such taxes is not dischargeable in bankruptcy.

The legislative history of Section 17a(1)(e) confirms that Congress intended that a corporate officer's Section 6672 liability is not dischargeable in bankruptcy. Prior to the 1966 amendment adding subsection (e) to Section 17, the Treasury had consistently objected to proposals before Congress that would have made the Section 6672 liability dischargeable in bankruptcy. Although Congress initially declined to adopt the Treasury's position in the belief that the enactment of a criminal penalty would suffice, in 1966 it provided explicitly for the non-dischargeability of such trust fund taxes.

In light of this legislative history, there is no basis for the court of appeals' conclusion that Section 17a (1)(e) applies only to the corporate employer and not to the Section 6672 liability of the officer responsible for the collection and payment of withheld taxes. Indeed, there would have been little reason for Congress to render non-dischargeable the corporate employer's obligation to pay withholding taxes, since it was fully aware that for all practical purposes a corporation ceases to exist after a liquidating bankruptcy. In providing for the non-dischargeability of "taxes * * * which the bankrupt has collected or withheld from others," Congress intended that the obligation to pay over such taxes that Section 6672 imposes upon a corporate officer such as respondent survive his personal bankruptcy.

B.

The court of appeals also erred in holding that respondent's Section 6672 liability was a dischargeable compensatory "penalty" rather than a non-dischargeable obligation for "taxes * * * legally due and owing by the bankrupt to the United States * * *" within the meaning of Section 17a(1) of the Bankruptcy Act. In so concluding, the court relied upon the use of the word "penalty" in Section 6672 to describe a corporate officer's personal obligation for unpaid taxes withheld from the wages of the corporation's employees.

But until the decision below, the courts of appeals had uniformly recognized that the purpose of Section 6672 is not to penalize in the usual sense of that term but simply to collect what are undisputably taxes. The liability Section 6672 imposes is therefore a "tax" despite its nomenclature as a "penalty." An unbroken line of decisions of this Court that the term "tax" as used in the Bankruptcy Act refers to "a pecuniary burden laid upon individuals or property for the purpose of supporting the Government * * *" supports our submission that the Section 6672 liability is a non-dischargeable "tax" under Section 17a(1). *New Jersey* v. *Anderson*, 203 U.S. 483, 492. Accord: *United States* v. *New York*, 315 U.S. 510, 515-516; *New York* v. *Feiring*, 313 U.S. 283, 287.

ARGUMENT

THE LIABILITY IMPOSED BY SECTION 6672 OF THE INTERNAL REVENUE CODE UPON PERSONS WHO ARE REQUIRED TO COLLECT AND PAY OVER TAXES WITHHELD FROM EMPLOYEES' WAGES BUT WHO WILLFULLY FAIL TO DO SO IS NOT DISCHARGEABLE UNDER SECTION 17 OF THE BANKRUPTCY ACT

A. Introduction

1. This federal tax case presents a question of considerable importance to the administration of the withholding tax system and the Bankruptcy Act. Since 1942, the collection of income taxes by withholding at the source has been an integral part of the internal revenue laws. As a practical matter, Con-

gress recognized that many persons found it difficult to pay their tax liabilities at the time they filed their returns after the close of the taxable year. By requiring withholding of taxes at the source, Congress sought to prevent the loss of large amounts of revenue that would not be collected between the receipt of income and the filing of the returns reporting such income.[5] The importance of this method of collecting is shown by the fact that withholding taxes on wages recently accounted for 83 percent of the total amount of individual income tax collections.[6]

The current statutory provisions are set forth in Sections 3402-3403 of the Internal Revenue Code of 1954, as amended, Appendix A, *infra*, pp. 2a-3a. Section 3402(a) provides that "[e]very employer making payment of wages shall deduct and withhold upon such wages" a tax determined in accordance with tables prescribed by the Secretary. Pursuant to Section 3403, "[t]he employer shall be liable for the payment of the tax required to be deducted and withheld * * *."[7] Section 7501 provides that the withheld taxes "shall be held to be a special fund in trust for the United States." Appendix A, *infra*, p. 4a.[8]

In imposing the collection obligation and the liability for withheld taxes upon the employer, Congress recognized that corporate employers could fail to set aside and pay over these taxes to the government. If the corporation proved unable to pay the taxes, the Treasury would suffer the loss because the employees from whose wages the taxes are withheld would still be credited with those amounts against their tax liability as if they were in fact paid over to the government. *Dillard* v. *Patterson*, 326 F.2d 302, 304 (C.A. 5); *Moore* v. *United States*, 465 F.2d 514, 517-518 (C.A. 5), certiorari denied, 409 U.S. 1108; *Hartman* v. *United States*, 538 F.2d 1336, 1340 (C.A. 8).

Accordingly, Congress sought to insure against such a result by imposing personal liability for withholding taxes upon those whose control of the financial affairs of a business entity requires them to collect and pay over taxes collected from third parties. Section 6672 of the Code, Appendix A, *infra*, pp. 3a-4a, provides that "Any person required to collect * * * and pay over any tax * * * who willfully fails to

[5] See Revenue Act of 1942, Section 172, 56 Stat. 884; Current Tax Payment Act of 1943, 57 Stat. 126; H.R. Doc. No. 237, 78th Cong., 1st Sess. 1 (1943); H.R. Rep. No. 268, 78th Cong., 1st Sess. 1-2 (1943). See also *United States* v. *American Friends Service Committee*, 419 U.S. 7, 10.

[6] *Annual Report of the Commissioner of Internal Revenue*, p. 137 (1976).

[7] There are similar provisions governing the collection of social security taxes. Section 3102(a) places the duty of collection upon the employer; Section 3102(b) imposes personal liability for the tax upon the employer. See Appendix A, *infra*, p. 2a. See also Section 3202 (Railroad Retirement Act taxes). Furthermore, the Code requires sellers and others to collect and pay over certain excise taxes. See, *e.g.*, 26 U.S.C. 4061, *et seq.*

[8] See also *Newsome* v. *United States*, 431 F.2d 742, 745-746 (C.A. 5), certiorari denied, 411 U.S. 986; *Kalb* v. *United States*, 505 F.2d 506, 509 (C.A. 2), certiorari denied, 421 U.S. 979; *Harrington* v. *United States*, 504 F.2d 1306, 1311 (C.A. 1); *High* v. *United States*, 506 F.2d 755, 756 (C.A. 5).

collect such tax, or truthfully account for and pay over such tax, * * * shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over." Section 6671(b) defines the statutory term "person" to include "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." [9]

2. It is undisputed that under the foregoing statutory provisions, O. J. Sotelo and Son Masonry, Inc., as an employer, was required to collect and withhold income and social security taxes from its employees and was liable for the payment of the taxes withheld. Moreover, respondent Onofre Sotelo does not deny that he was a person responsible for the collection and payment of such taxes from the employees of his corporation and that his failure to do so triggered his personal liability under Section 6672 (see Pet. App. C, p. 18a). However, respondent contends, and the court of appeals held, that his liability for the unpaid withholding taxes is dischargeable in his subsequent personal bankruptcy.[10]

As we shall show, the decision of the court of appeals rests upon two erroneous grounds and reversal on either of these grounds is an independent basis for reversal of its judgment.

1. In holding that respondent's Section 6672 liability was dischargeable in his personal bankruptcy, the court of appeals refused to apply Section 17a (1)(e) of the Bankruptcy Act, which bars a discharge for withholding tax obligations of the type at issue here.

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[9] Section 6671(b) specifies that the term "person" required to collect or withhold taxes "*includes* an officer or employee of a corporation, or a member or employee of a partnership." The section is not limited, therefore, to officers and employees of a corporation. See, *Groman* v. *Commissioner*, 302 U.S. 82, 86, in which this Court stated in connection with analogous terminology, "when an exclusive definition is intended the word 'means' is employed, * * * whereas here the word used is 'includes'. If more were needed § 701(b) declares: 'The terms 'includes' and 'including' when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined.'" See also 26 U.S.C. 7701(b), the equivalent provision in the 1954 Code.

Thus, while Section 6672 is most frequently invoked against corporate officers, the provision has been held to apply to partners, lenders, and others. See, *e.g.*, *Mueller* v. *Nixon*, 470 F.2d 1348, 1349-1350 (C.A. 6), certiorari denied, 412 U.S. 949 (officer of a second corporation); *Adams* v. *United States*, 504 F.2d 73, 75-76 (C.A. 7) (finance company); *Pacific National Ins. Co.* v. *United States*, 422 F.2d 26, 29-30 (C.A. 9), certiorari denied, 398 U.S. 937 (surety); *Werner* v. *United States*, 512 F.2d 1381, 1382 (C.A. 2), affirming 374 F. Supp. 558 (D. Conn.) (creditor); *Genins* v. *United States*, 489 F.2d 95, 96 (C.A. 5) (partner).

[10] *Slodov* v. *United States*, certiorari granted, October 3, 1977 (No. 76-1835), which is set for oral argument in tandem with this case, also arose in the context of a personal bankruptcy proceeding. There, the question is whether an officer of a corporation was a person responsible for payment of withholding taxes who willfully failed to do so, and therefore liable for the unpaid taxes under Section 6672. In *Slodov*, the bankrupt does not assert that the government's claim for unpaid withholding taxes is dischargeable in bankruptcy. We are serving a copy of this brief upon counsel for the petitioner in *Slodov*.

2. Alternatively, the court of appeals erred in holding that respondent's Section 6672 liability was a dischargeable "penalty" rather than a non-dischargeable obligation for "taxes * * * legally due and owing by the bankrupt to the United States" within the meaning of Section 17a(1) of the Bankruptcy Act. Since Section 6672 is a device to collect what are indisputably taxes, the liability it imposes upon persons responsible for their collection and payment is likewise a non-dischargeable "tax" within the meaning of Section 17a(1).

B. Section 17a(1)(e) Of The Bankruptcy Act Bars A Discharge Of A Bankrupt's Liability For Taxes That He Is Required To Withhold From Third Parties

1. Section 17a(1)(e) of the Bankruptcy Act, Appendix A, *infra*, pp. 4a-5a, states that "a discharge in bankruptcy shall not release a bankrupt from any taxes * * * which the bankrupt has collected or withheld from others as required by the laws of the United States * * *." The language of this provision is explicit and controls this case. It bars a discharge of the liability imposed upon an officer of a corporation who is required to withhold and pay over taxes from the wages of the corporation's employees.

Respondents' corporation had withheld taxes from the wages of its employees, pursuant to the requirements of 26 U.S.C. 3402. As a responsible officer of his corporation, respondent Onofre Sotelo was required, by 26 U.S.C. 6671(b) and 6672, to collect and pay over the withholding taxes of his corporation

and is personally liable for his failure to do so. Under these circumstances, Section 17a(1)(e) directs that the liability imposed by Section 6672 upon such an officer of a business entity to pay such taxes is not dischargeable in bankruptcy.

The legislative history of Section 17a(1)(e) confirms that Congress intended that a corporate officer's Section 6672 liability for withholding taxes would not be dischargeable in bankruptcy. Prior to the 1966 amendment of Section 17, the Treasury Department had consistently objected to proposals in Congress that would have made the Section 6672 liability dischargeable in bankruptcy. As the Treasury pointed out to the House Committee on the Judiciary with respect to a proposed revision of Section 17 (H.R. Rep. No. 2535, 85th Cong., 2d Sess. 6 (1958)):

> The kind of overhanging liability frequently encountered in bankruptcy cases is not primarily income tax but often includes substantial amounts of withholding taxes deducted from employees' wages and salaries, as well as social security and unemployment taxes, and excise taxes. Some of these unpaid tax liabilities, therefore, represent amounts wihheld [*sic*] from employees or other persons which are legally held in trust for the Government. The proposal would thus discharge or reduce the priority of liabilities resulting not from the bankrupt's failure to pay his own taxes but from his failure to keep intact money which he had obtained from others as a trustee for the Government.

Congress initially declined to adopt the Treasury's position in favor of non-dischargeability of trust fund taxes in the belief that a criminal penalty (26 U.S.C. 7215) against responsible persons who fail to pay over such taxes would be an effective deterrent to avoidance of withholding tax obligations. As the House Committee observed (H.R. Rep. No. 2535, *supra*, at 5)—

> Proposals to limit the priority and nondischargeability of taxes have been criticized on the ground that they would release a bankrupt from liability for tax money which he had withheld from others but had not paid over to the Government. The argument has been substantially weakened by the enactment during this Congress of Public Law 85-321. That act provides criminal penalties against anyone who, after notice by the United States, fails to deposit withholding taxes in an account in trust for the United States.

See also H.R. Rep. No. 735, 86th Cong., 1st Sess. 5 (1959); S. Rep. No. 1182, 85th Cong., 2d Sess. 2 (1958).[11]

[11] 26 U.S.C. 7215(a) provides that any person who fails to comply with the withholding requirements, after receipt of notice of these requirements pursuant to 26 U.S.C. 7512(b), is guilty of a misdemeanor punishable by a maximum fine of $5,000 or a maximum prison term of one year, or both. See, *e.g.*, *United States* v. *McMullen*, 516 F.2d 917, 920 (C.A. 7); *United States* v. *Patterson*, 465 F.2d 360, 361 (C.A. 9), certiorari denied, 409 U.S. 1038. See also 8A Mertens, *Law of Federal Income Taxation*, § 47A.25a, pp. 216-222 (1971 rev.).

See also 26 U.S.C. 7202, which provides that willful failure to collect and pay over taxes is a felony punishable by a maximum fine of $10,000 or a maximum prison term of five years, or both.

Despite the enactment of the criminal statute, the Treasury continued to press for non-dischargeability in bankruptcy of the responsible officer's obligation to pay withholding taxes in order to enhance the collectability of such taxes, which "shall be held to be a special fund in trust for the United States" (26 U.S.C. 7501): As David A. Lindsay, the Assistant to the Secretary, wrote to Representative Celler, the Chairman of the House Committee on the Judiciary, the criminal provisions would not be effective in eliminating delinquencies in trust fund taxes arising prior to the Internal Revenue Service's issuance of a special notice to the responsible person. "These delinquencies simply become a part of the unpaid tax liability of the bankrupt, and the problem which exists upon the failure of the bankrupt to keep these trust fund moneys intact remains in spite of the passage of * * * [the criminal statute]." H.R. Rep. No. 735, *supra*, at 7.

The Treasury's practical experience confirmed the accuracy of its earlier prediction that the criminal provision would not be effective in preventing delinquencies in trust fund tax liabilities. In 1961, Assistant Secretary of the Treasury Stanley S. Surrey wrote to Senator Eastland, the Chairman of the Senate Committee on the Judiciary: "Delinquency in this area has increased in recent years, and the Department considers it most undesirable to permit

persons who are charged with the responsibility of paying over to the Federal Government moneys collected from third persons to be relieved of their obligations in bankruptcy when they have converted such moneys for their own use." S. Rep. No. 114, 89th Cong., 1st Sess. 10 (1965). See also H.R. Rep. No. 372, 88th Cong., 1st Sess. 6 (1963).

In response to this repeatedly stated concern of the Treasury that the personal bankruptcy of a responsible officer such as respondent would serve as a shield against his Section 6672 liability for unpaid withholding taxes, Congress added subsection (e) to Section 17a(1) of the Bankruptcy Act. It provides: "That a discharge in bankruptcy shall not release a bankrupt from any taxes * * * (e) which the bankrupt has collected or withheld from others as required by the laws of the United States * * *, but has not paid over * * *." As the House Committee explained in reporting out the measure, the purpose of the amendment was "to exempt from the provisions of this bill taxes which the bankrupt has collected or withheld from others under Federal or State law." H.R. Rep. No. 372, *supra*, at 1. In the House Committee's view, "* * * the objection of Treasury to the discharge of so-called trust fund taxes has been met by the amendment to this bill." *Id.* at 5. The Senate Reports likewise confirm that the purpose of Section 17a(1) (e) was to render trust fund taxes non-dischargeable in bankruptcy. S. Rep. No. 1134, 88th Cong., 2d Sess. 1, 6 (1964); S. Rep. No. 114, *supra*, at 6.

2. In light of the foregoing legislative history, there is no basis for the court of appeals' conclusion (Pet. App. C, p. 21a) that Section 17a(1)(e) applies only to the corporate employer and not to the Section 6672 liability of the officer responsible for the collection and payment of withheld taxes. In the court of appeals' view (*ibid.*), Section 17a(1)(e) of the Bankruptcy Act "applies only to taxes 'which the bankrupt has collected or withheld from others as required by the laws of the United States,' and it was not Sotelo himself, but his employer-corporation, that was obligated by law to collect and withhold the taxes governed by the proviso."

But the court's restrictive gloss on Section 17a(1) (e) cannot be squared with the fact that respondent was a "person required to collect, truthfully account for, and pay over" his corporation's withholding taxes under Section 6671(b) and 6672 of the Code. These statutory provisions recognize that corporations are inanimate legal entities that can act only through their officers or employees. While the corporation was obligated to collect and pay over these taxes, that function was statutorily required to be performed by respondent himself.

Respondent "collected" such taxes by paying net wages to his employees. However, he willfully failed to pay them over to the government. Thus, respondent is a "bankrupt [who] has collected or withheld [taxes] from others as required by the laws of the United States * * * but [who] has not paid [them] over" within the meaning of Section 17a(1)(e).

Moreover, the court's reading of Section 17a(1)(e) ignores the explicitly stated congressional intent to preserve the liability for trust fund taxes beyond the bankruptcy of persons responsible for the collection and payment of withholding taxes. Indeed, there would have been little reason for Congress to render non-dischargeable the corporate employer's obligations to pay withholding taxes, since it was fully aware that for all practical purposes a corporation effectively ceases to exist after a liquidating bankruptcy. As both the House and Senate Committee reports observed, "Although a corporate bankrupt is theoretically not discharged, the corporation normally ceases to exist upon bankruptcy and unsatisfied tax claims, as well as all other unsatisfied claims, are without further recourse even though the enterprise may continue in a new corporate form." H.R. Rep. No. 735, *supra*, at 2; S. Rep. No. 114, *supra*, at 2-3. In providing for the non-dischargeability of "taxes * * * which the bankrupt has collected or withheld from others as required by the laws of the United States * * *," Congress intended to protect the revenues by providing that the obligation to pay over such taxes that Sections 6671(b) and 6672 impose upon a corporate officer such as respondent should survive his personal bankruptcy.[13]

[13] See Kennedy, *The Bankruptcy Amendments of 1966*, 1 Ga. L. Rev. 149, 177 (1967); Marsh, *Triumph or Tragedy? The Bankrutcy Act Amendments of 1966*, 42 Wash. L. Rev. 681, 694 (1967).

The court of appeals' further conclusion that Section 17a(1)(e) is inapplicable because it "renders only 'taxes' nondischargeable, not a 'penalty' imposed under 26 U.S.C. § 6672" (Pet. App. C, p. 21a), is equally erroneous. As we shall argue in Part C, *infra*, pp. 25-32, the liability equal to unpaid withholding taxes that is imposed by Section 6672 upon a responsible officer is a non-dischargeable tax within the meaning of Section 17a(1) and not a dischargeable compensatory penalty. But whether or not respondent's personal liability for the unpaid withholding taxes is a "tax" or a "penalty," the phrase "taxes * * * which the bankrupt has collected or withheld from others" in Section 17a(1)(e) encompasses the sums at issue here.

The structure of the statute—with the phrase "collected or withheld from others" modifying the word "taxes"—confirms that the amounts at issue must be characterized at the time of collection or withholding. At the time respondent collected or withheld funds from the wages of his corporation's employees, those funds were "taxes" and not penalties. Respondent's subsequent willful failure to pay the amounts withheld over to the government, which triggered his liability under Section 6672, did not change their essential character as taxes for purposes of Section 17a(1)(e).[14]

[14] Currently pending bankruptcy legislation (H.R. 8200, 95th Cong., 1st Sess. (1977)) excepts Section 6672 liability from discharge. The bill provides (proposed 11 U.S.C. 523(a)(1)) that a discharge under the title does not discharge

3. The court of appeals attempted to buttress its decision with the observation that "[a]s a policy matter, the government's position that [respondent] remains personally liable, notwithstanding bankruptcy, for taxes required to be withheld by his corporation, can lead to substantial inequities" (Pet. App. C, *infra*, p. 21a). In the court's view, there is

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an individual debtor from any debt—"for a tax—(A) of the kind and for the periods specified in section 507(6)." Section 507(6)(C) specifies that "taxes required to be withheld from wages, salaries, commissions, dividends, interest, or other payments that were paid by the debtor, or by a corporation or partnership that is an insider if the debtor is liable for such taxes * * *" are included in the category of taxes to be accorded priority, and by virtue of the reference in Section 523(a)(1), the liability for such taxes is rendered nondischargeable. The term "insider" includes officers, directors and persons in control of the corporations (see proposed 11 U.S.C. 101(24)). See also, Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, Part II, 93d Cong., 1st Sess. 110, 116, 136 (1973).

In reporting out this measure, the House Committee viewed the bill as consistent with present law. The House Report stated (H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 191 (1977):

> The current Bankruptcy Act renders nondischargeable all taxes which the bankrupt has collected or withheld from others but has not paid over. Thus, withholding taxes are accorded an unlimited priority under present law. The priority even includes the 100 percent "penalty" imposed under the Internal Revenue Code. The present unlimited priority is justified by the notion that withholding taxes are held in trust. [Footnotes omitted.]

Compare *id.* at 190, with the comments of Representative Edwards, 123 Cong. Rec. H11708-H11709 (daily ed., October 27, 1977). See also Senate Bill 2266, 95th Cong., 1st Sess. (1977), which would also continue the non-dischargeability of the Section 6672 liability.

no nexus between the estate of an individual bankrupt corporate officer and the liability of his corporation for unpaid withholding taxes.

But Section 6672 creates the nexus that the court believed to be lacking by imposing personal liability for such taxes upon the officer whose preference of other creditors over the government benefitted his corporation in the first instance. There is no inequity in providing that the corporate officer whose actions resulted in the corporation's withholding tax delinquency cannot eliminate his liability for such taxes through personal bankruptcy.

Indeed, contrary to the assumption of the court of appeals, its decision subjects the government to a substantial inequity. By failing to pay the taxes withheld from his employees' wages, respondent wrongfully appropriated moneys and contributed them to the capital of his corporation despite the statutory command that such amounts "shall be held to be a special fund in trust for the United States" (26 U.S.C. 7501).

As we have pointed out *supra*, p. 11, the government credits the employees' accounts with the taxes withheld despite the willful failure of a corporate officer such as respondent to pay them over to the government. In such circumstances, the government obligates itself to pay social security benefits and income tax refunds to the employees even though it has not received the necessary taxes. If, as the decision below holds, the responsible officer can violate his fiduciary obligation to the government and thereafter shield himself from liability by means of

personal bankruptcy,[14] the government potentially stands to suffer a twofold loss—first, by failing to receive taxes that are lawfully due, and second, by disbursing benefits on the assumption that the taxes necessary to fund those benefits have been paid.

Finally, the court of appeals thought that the result we seek in this case would "contravene the Bankruptcy Act's basic policy of settling a bankrupt's past debts and providing a fresh economic start" (Pet. App. C, p. 22a). However, these general considerations do not answer the specific statutory question at bar whether the liability imposed by Section 6672 is dischargeable under Section 17. The latter provision sets forth a detailed list of classes of obligations that Congress determined as a matter of policy were not properly dischargeable in bankruptcy.

As this Court stated in *Bruning* v. *United States*, 376 U.S. 358, 361, in terms that are equally appropriate here: "Nor is petitioner aided by the now-familiar principle that one main purpose of the Bankruptcy Act is to let the honest debtor begin his financial life anew. * * * § 17 is not a compassionate section for debtors. Rather, it demonstrates congressional judgment that certain problems—*e.g.*, those of financing government—override the value of giving the debtor a wholly fresh start" (footnote omitted).

[14] Compare Section 17a(4) of the Bankruptcy Act, which bars a discharge of obligations that "were created by [a bankrupt's] fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

If the Court agrees with the foregoing submission that respondent's withholding tax liability is non-dischargeable under Section 17a(1)(e), it need not reach our alternative argument, *infra*, pp. 25-32, that the liability is a non-dischargeable "tax" under Section 17a(1). However, since the conflict in the circuits concerns that alternative statutory ground (see Pet. 5-7, 11-12), the Court may wish to address the point in the interest of the orderly administration of the internal revenue and bankruptcy laws. See *Donaldson* v. *United States*, 400 U.S. 517, 531-536.

C. The Liability For Unpaid Withholding Taxes Imposed Upon A Responsible Officer By Section 6672 Is A Non-Dischargeable Tax Under Section 17a(1) Of The Bankruptcy Act

1. Section 17a of the Bankruptcy Act provides that—

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States * * * within three years preceding bankruptcy.

If, as we submit, respondent's liability for his corporation's unpaid withholding taxes is a tax, Section 17a(1) offers an independent ground for the non-dischargeability of the government's claim against respondent.[15]

[15] The three-year limitations period does not bar the government's claim in this case because the withholding taxes

Despite the "penalty" nomenclature employed by Section 6672 in describing the responsible officer's liability for unpaid withholding taxes (see *infra*, pp. 29-32), the authorities have always regarded that liability as a tax. There is accordingly no sound reason for the court of appeals' conclusion that the Section 6672 liability is a dischargeable compensatory penalty rather than a non-dischargeable tax.[16] As a historical

at issue were due to be paid in 1971 and 1973, and respondent filed his petition in bankruptcy on July 5, 1973 (Pet. App. A, p. 1a). The legislative history of Section 17a(1) indicates that the phase "due and owing" means the date on which the return is due to be filed and the taxes paid. See comments of Senator Ervin, 112 Cong. Rec. 13814 (1966); see also, comments of Senator Gore, 112 Cong. Rec. 13812-13813 (1966). See also Internal Revenue Manual, Part V, par. 5922.2(5); 1A *Collier on Bankruptcy* ¶ 17.14[1] (14th ed.). The liability for taxes under Section 6672 is deemed to be "due and owing" on the date the person responsible for seeing that the taxes are paid failed to do so—the date the corporate returns were due to be filed. Under 26 U.S.C. 6501(b)(2), the quarterly withholding tax returns are deemed to be filed on April 15 of the succeeding calendar year.

[16] In holding that the liability imposed by Section 6672 is a "penalty" rather than a "tax," the court of appeals did not distinguish between a non-compensatory and a compensatory penalty. If the court had classified the Section 6672 liability as a non-compensatory penalty, presumably it would have held that the liability was non-dischargeable. Because the purpose of such a penalty is to punish the bankrupt rather than his creditors, penalties are not allowable out of the assets of the bankruptcy estate and are non-dischargeable. See 1A *Collier on Bankruptcy*, *supra*, at ¶¶ 1705, 17.13; Bankruptcy Act, Section 57j, 30 Stat. 561, as amended (11 U.S.C. 93(j)); *Simonson* v. *Granquist*, 369 U.S. 38. However, compensatory penalties are allowable under Section 57j of the Bankruptcy Act and, as such, are presumptively discharge-

matter, Congress has always excepted all federal taxes from discharge in bankruptcy[17] and has accorded federal taxes priority over other creditors' claims. See Section 64a(4), 11 U.S.C. 104(a)(4). Since Section 6672 is a device to collect what are indisputably taxes, the liability it imposes upon persons such as respondent who are responsible for their collection and payment is likewise a non-dischargeable "tax" within the meaning of Section 17a(1). Indeed, Section 6672 does not impose a penalty but simply shifts the tax obligation from the business entity to the responsible officer without any further economic sanction that could be deemed to be a fine.[18] Respondent's liability under Section 6672 is no less a tax liability because his corporation was also liable for the taxes.

The foregoing analysis finds support in the decisions of this Court defining the term "tax" as used in the Bankruptcy Act. As the Court has observed, the term "tax" in that statutory context is "a pecuniary burden laid upon individuals or property for the purpose of supporting the Government" (*New*

able. 2 Remington on *Bankruptcy*, § 3304 (6th ed.). We therefore assume that the court intended to hold that the liability was a compensatory penalty.

[17] The three-year limitations period was added to the statute in 1966 to eliminate stale tax claims. See H.R. Rep. No. 735, *supra*, at 2-3; S. Rep. No. 114, *supra*, at 2-3.

[18] In analogous circumstances, Sections 6901 and 2002 of the Code impose liability for taxes upon transferees and executors of estates, which are not penalties dischargeable in bankruptcy but non-dischargeable taxes. *Hamar* v. *Commissioner*, 42 T.C. 867, 878-879.

Jersey v. *Anderson*, 203 U.S. 483, 492) "by whatever name it may be called" (*United States* v. *New York*, 315 U.S. 510, 515-516). See also *Sonzinsky* v. *United States*, 300 U.S. 506, 513; *Bob Jones University* v. *Simon*, 416 U.S. 725, 741; *United States* v. *Butler*, 297 U.S. 1, 61. Moreover, the Section 6672 liability "is not any the less a tax laid on * * * [respondent] because the statute places a like burden in the alternative on the * * * [corporation] * * *." *New York* v. *Feiring*, 313 U.S. 283, 287.

Put another way, respondent cannot exploit his willful failure to collect and pay over the withholding taxes—the fact upon which his personal liability rests[19]—as a ground for recharacterizing his statutory obligation to pay such taxes. Since Section 6672 does not seek to punish the responsible officer but only to collect corporate withholding tax delinquencies for the purpose of supporting the government, it is a non-dischargeable "tax" within the meaning of Sec-

[19] Section 6672 applies where the responsible person "willfully" fails to pay over the required taxes. The statutory term "willful" as used in the section refers only to a voluntary and conscious decision to prefer other creditors. *Harrington* v. *United States*, 504 F.2d 1306 (C.A. 1); *Horwitz* v. *United States*, 339 F.2d 877, 878 (C.A. 2); *Liddon* v. *United States*, 448 F.2d 509, 513 (C.A. 5), certiorari denied, 406 U.S. 918; *Braden* v. *United States*, 442 F.2d 342 (C.A. 6), certiorari denied *sub nom. Bonistall* v. *Braden*, 404 U.S. 912; *Monday* v. *United States*, 421 F.2d 1210, 1215-1216 (C.A. 7), certiorari denied, 400 U.S. 821; *United States* v. *Strebler*, 313 F.2d 402, 405 (C.A. 8); *Teel* v. *United States*, 529 F.2d 903, 905 (C.A. 9); *Burden* v. *United States*, 486 F.2d 302, 304 (C.A. 10), certiorari denied, 416 U.S. 904.

tion 17a(1) and not a penalty. Cf. *United States* v. *Childs*, 266 U.S. 304, 307.

2. In holding that respondent's Section 6672 liability was a dischargeable compensatory "penalty" rather than a non-dischargeable obligation for "taxes * * * legally due and owing by the bankrupt to the United States," the court of appeals relied upon the use of the word "penalty" in Section 6672 to describe a corporate officer's personal obligation for unpaid taxes withheld from the corporation's employees. Pursuant to that provision, a responsible officer who willfully fails to pay over the tax "shall * * * be liable to a *penalty* equal to the total amount of the tax evaded, or not collected * * *." As the court viewed the matter, its conclusion was required by "Congress' own characterization of the liability it created in Section 6672" (Pet. App. C, p. 20a).

But as we have pointed out *supra*, pp. 11-12, 26-28, Section 6672 does not impose a "penalty" in the usual sense of that term; it simply shifts the withholding tax liability from the corporation to the responsible officer when the officer willfully fails to pay over the taxes to the government. Indeed, it is the longstanding policy of the Internal Revenue Service to assert Section 6672 liability against a responsible officer only when, as here, the corporate employer is unable to pay the withholding taxes. Moreover, the amount of the Section 6672 liability is collected only once. Thus, when the Service makes more than one assessment of Section 6672 liability against several officers responsible for a single default, a payment of some part of

the tax results in a *pro tanto* abatement of the assessments. See Policy Statement P-5-60 (Approved November 5, 1956) MT 1218-56; U.S. Comp. Gen. Op. B-137762, May 3, 1977 (9 CCH Standard Fed. Tax Rep., ¶ 6614, p. 71,438 (1977)). See also *Hartman* v. *United States, supra*, 538 F.2d at 1340; *Newsome* v. *United States, supra*, 431 F.2d at 746.[20]

Since the Treasury has always administered Section 6672 as a method to collect what are undisputably taxes, the courts of appeals (except for the decisions below) and the Court of Claims have uniformly recognized that "[i]ts basic purpose is the protection of governmental revenue" "[d]espite its denomination as a 'penalty' assessment * * *." *Monday* v. *United States, supra*, 421 F.2d at 1216. Accord: *Harrington* v. *United States, supra*, 504 F.2d at 1311; *Spivak* v. *United States*, 370 F.2d 612, 616 (C.A. 2), certiorari denied, 387 U.S. 908; *Cross* v. *United States*, 311 F.2d 90, 94 (C.A. 4); *Moore* v. *United States*, 465 F.2d 514, 517 (C.A. 5), certiorari denied, 409 U.S. 1108; *Mueller* v. *Nixon, supra*, 470 F.2d at 1350; *Sorenson* v. *United States*, 521 F.2d 325,

[20] But cf. *Otte* v. *United States*, 419 U.S. 43, 52. There, in dictum, the Court described the Section 6672 liability as "a penalty, apart from the tax, on a person who willfully fails to fulfill his obligation to withhold * * *." That case, however, dealt with the priority of withholding taxes on wages paid during bankruptcy and did not involve the imposition of the Section 6672 liability. Thus, none of the considerations discussed above in the text as to how the statute is administered and is characterized by the case law were brought to the attention of the Court in *Otte*.

328 (C.A. 9); *White* v. *United States*, 372 F.2d 513, 516 (Ct. Cl.).[21]

It is therefore hardly surprising that prior to the decision below, two circuits (*Murphy* v. *Internal Revenue Service*, 533 F.2d 941 (C.A. 5), affirming 381 F. Supp. 813, 816-817 (N.D. Ala.); *Lackey* v. *United States*, 538 F.2d 592 (C.A. 4)), as well as every reported district court decision, regarded it as settled that the liability imposed by Section 6672 is a non-dischargeable tax under Section 17a(1) of the Bankruptcy Act because it "is not a penalty as that term is generally used, but in reality is a liability for a tax originally imposed upon the corporation and shifted to the corporate officer upon his default." *Sherwood* v. *United States*, 228 F. Supp. 247, 251

[21] See also *Botta* v. *Scanlon*, 314 F.2d 392 (C.A. 2), holding that the liability imposed by Section 6672 is a "tax," the collection of which cannot be enjoined because of the Anti-Injunction Act, 26 U.S.C. 7421(a). The court of appeals sought to distinguish that case on the ground that Section 6671(a) provides that the Section 6672 liability is to be regarded as a "tax" for purposes of the Internal Revenue Code and that there is no similar provision in the Bankruptcy Act (see Pet. App. C, pp. 19a-20a).

But it does not follow that, because there is no statutory equivalent of Section 6671(a) in the Bankruptcy Act, the liability must be regarded as a penalty under that Act. Whether the liability is a tax for purposes of the Bankruptcy Act depends upon the meaning of the term "tax" as it is used in the Bankruptcy Act. As we have pointed out *supra*, pp. 27-28, the decisions of this Court have established that the term "tax" is broadly used by the Bankruptcy Act to mean a pecuniary burden laid upon individuals or property for the purpose of supporting the government.

(E.D. N.Y.). Accord: *Severance* v. *United States*, 76-2 U.S.T.C., par. 9643, pp. 85,026-85,027, decided June 3, 1976 (N.D. Tex.); *Westenberg* v. *United States*, 285 F. Supp. 915, 917 (D. Ariz.); *Lynn* v. *Scanlon*, 234 F. Supp. 140, 144-145 (E.D. N.Y.).[22] The standard bankruptcy and tax treatises and commentators likewise agree that the liability is a nondischargeable tax. 1A Collier on *Bankruptcy*, ¶ 17.14 [9] n. 38 (14th ed.); 8 Remington on *Bankruptcy*, § 3317 (1976 Supp., 6th ed.); 8A Mertens, *Law of Federal Income Taxation*, § 47A.25a, p. 209 (Rev. 1971); see also Kingsmill, *When and How is a Bankrupt Discharged from Federal Tax Debt*, 31 J. Tax. 180, 182 (1969).

[22] See also *Kalb* v. *United States*, *supra*, 505 F.2d at 509; *Larson* v. *United States*, 340 F. Supp. 1197, 1199 (E.D. Wis.); *Matter of Baker*, 73-1 U.S.T.C., par. 9406, p. 80,958, decided March 6, 1973 (W.D. Pa.); *Butler* v. *Cohen*, 69-2 U.S.T.C., par. 9466, p. 85,112 n. 6, decided May 13, 1969 (N.D. N.Y.); *In re O'Ffill*, 368 F. Supp. 345, 349, 351 (D. Kan.). Contra: *United States* v. *Young*, E.D. Wis., No. 70-C-332, decided August 26, 1977, where the court was required to follow the Seventh Circuit's decision in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.[23]

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

M. CARR FERGUSON,
Assistant Attorney General.

STUART A. SMITH,
Assistant to the Solicitor General.

CROMBIE J. D. GARRETT,
WYNETTE J. HEWETT,
Attorneys.

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[23] The government failed to point out to the court of appeals that the questions of dischargeability of respondent's Section 6672 liability and the right to the homestead fund were independent. Thus, in holding respondent Onofre Sotelo's Section 6672 liability to be dischargeable, the court of appeals erroneously assumed that it did not have to reach the alternative argument, rejected by the bankruptcy judge (Pet. App. A, pp. 7a-10a), that his wife was entitled to a state homestead exemption free from her husband's liability (see Pet. App. C, p. 22a n. 3). However, whether or not Onofre Sotelo's liability is dischargeable, the court of appeals must at all events address the contention that his wife owned the $10,000 homestead fund (see *supra*, pp. 4-5). Since that fund was set apart outside the bankruptcy estate and levied upon by the Internal Revenue Service, it was not property acquired after bankruptcy that [illegible] be affected by a discharge. With respect to such property, Section 17a(1) provides that "a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof,

against the exemption of the bankrupt allowed by law and duly set apart to him under this title * * *." See 1A Collier on *Bankruptcy*, *supra* ¶ 17.14[7]. Under 26 U.S.C. 6334(a) and (c), the homestead fund is not exempt from a federal tax levy. The government's claim to that fund can only be defeated if Naomi Sotelo is deemed to have owned the homestead.

Thus, the question of dischargeability is irrelevant to the government's right to the homestead fund. However, the parties also put at issue in the lower courts the dischargeability of the government's tax claim of $32,840.71. The court of appeals decided the case on that issue, and that is the question presented in the petition (p. 2).

APPENDIX A*

Internal Revenue Code of 1954 (26 U.S.C. (1970 ed., as amended by the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, 1557)):

SEC. 3101 [as amended by Section 321(b), Social Security Amendments of 1965, 79 Stat. 395.] RATE OF TAX.

(a) Old-Age, Survivors, and Disability Insurance.—In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

SEC. 3102. DEDUCTION OF TAX FROM WAGES.

(a) [as amended by Section 205, Social Security Amendments of 1954, 68 Stat. 1093; Section (h)(3), Social Security Amendments of 1956, 70 Stat. 841; and Section 313(c)(2), Social Security Amendments of 1965, 79 Stat. 383]. Requirement.—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. An employer who in any calendar quarter pays to an employee cash remuneration to which paragraph (7)(B) or (C) or (10) of section 3121(a) is applicable may deduct an amount equivalent to such tax

* There is no material difference between the current statutory provisions and those which existed during the years at issue. We are therefore setting forth in this Appendix the current statutory provisions.

from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $50; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (8)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $150 and the employee has not performed agricultural labor for the employer on 20 days or more in the calendar year for cash remuneration computed on a time basis; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) to which paragraph 12(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax with respect to such tips from any wages of the employee (exclusive of tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $20.

(b) Indemnification of Employer.—Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of such payment made by such employer.

* * * * *

SEC. 3402. INCOME TAX COLLECTED AT SOURCE.

(a) [as amended by Section 401(d). Tax Reform Act of 1976, 90 Stat. 1557]. Requirement of Witholding.—Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables prescribed by the Secretary. With respect to wages paid prior to January 1, 1978, the tables so prescribed shall be the same as the tables prescribed under this section which were in effect on January 1, 1976. With respect to wages paid after December 31, 1977, the Secretary shall prescribe new tables which shall be the same as the tables proscribed under this subsection which were in effect on January 1, 1975, except that such tables shall be modified to the extent necessary to reflect the amendments made to subsections (b) and (c) of Section 141 by the Tax Reform Act of 1976. For purposes of applying such tables, the term "the amount of wages" means the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in the table in subsection (b)(1).

* * * * *

SEC. 3403. LIABILITY FOR TAX.

The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

SEC. 6671. RULES FOR APPLICATION OF ASSESSABLE PENALTIES.

(a) *Penalty Assessed as Tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person Defined.*—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) *General Rule.*—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

* * * * *

Bankruptcy Act, c. 541, 30 Stat. 544, 550, Sec. 17 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840, 851] (11 U.S.C. 35):

SEC. 17. *Debts not affected by a discharge.*

a [as amended by Section 2, Act of July 5, 1966, Pub.L. 89-496, 80 Stat. 270]. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy: *Provided, however,* That a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any

case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this Act: *And provided further*, That a discharge in bankruptcy shall not release or affect any tax lien;

* * * * *

APPENDIX B

734 | 6 | [illegible]-73-[illegible]

4

7-5-73

[illegible], [illegible] J.

P. O. Box 32
105 Scandia

City		County	State
Alpha		Henry	Illinois

X

Robert D. Morgan

Stephen J. Covey

Winstein, Kavensky & Wallace, Rock Island Bank Building, Rock Island, Ill.

Date	Description	Received	Disbursed	Balance
1973				
July 5	Winstein, Kavensky:, & Wallace	55.00		
July 9	Tr. U. S. Ref. Sal. & Exp. CD#1.		37.00	
July 9	Tr. U. S. Clerk's Fee CD#1		3.00	15.00
July 25	Winstein, Kavensky & Wallace Amend.	10.00		
July 30	Tr. Ref. Sal. CD#4		10.00	
August 6	Viola Musgrave, Ct. Rep. Vo.#5 Check # 14752		5.00	10.00
August 20	Waldo M. Wissler Reol.	10.00		
August 20	Tr. U.S.Ref. Sal. & Exp. CD#9		10.00	
Oct. 19	Winstein, Kavensky & Wallace Amend.	10.00		
Oct. 23	Tr. U. S. Ref. Sal.&Exp. CD#16		10.00	
1976				
Feb. 5	Bruce L. Balch, Notice of Appeal Record filed with Clerk 2-4-76	10.00		
Feb. 9	Tr.U.S.Ref.Sal.&Exp. CD#19-RI		10.00	
Mar.22	Bruce L. Balch, Notice of Appeal	5.00		
	TR. U.S.Treas. Clerk's Fee CD#23		5.00	
Mar. 22	Bond for cost on Appeal	$250.00		
	Dep. Reg. Fund CD#17-RI		$250.00	

BANKRUPTCY LEDGER SHEET

RI-BK-73-233 and 34 Onofre J. Sotelo and Naomi Sotelo

1976

Feb. 2 Notice of Appeal to District Court filed by bankrupts.
Feb. 2 Designation and Issues on Appeal filed.
Feb. 4 Record on Appeal filed with clerk of U. S. District Court on this date. Attorneys of record notified by Clerk of docketing date. (Record forwarded to Judge Morgan)

Feb. 23 Decision and Order filed and entered wherein it is Ordered that the Order of the Bankruptcy Judge herein filed January 23, 1976 is AFFIRMED on appeal in this Court. (See Decision and Order) (Morgan, J.) (Copies of Decision and Order mailed to Attorneys of Record by the Court.) (Record on Appeal returned to BK. Court)

Mar. 22 Notice of Appeal filed by Onofre J. and Naomi Sotelo. (Copy of Notice of Appeal and Clerk's docket entries mailed to U. S. Court of Appeals on 3-24-76. U.S.Atty. and Trustee notified by Clerk.) Bond on Appeal filed. CD#17-RI.
Mar. 24 Record on Appeal returned to Clerk from Bankruptcy Court.

Apr. 28 Original Record on Appeal forwarded to the U. S. Court of Appeals for the 7th Circuit along with Clerk's Certification. (Copy of record mailed to Atty.Balch.)

U.S. Court of Appeals
Seventh Circuit—Docket

76-14

Dist. No. ______ General No. ______ Related Nos. ______

[ ] P.L. Card / Admin. Review [ ] U.S. Card / Admin. Enforcement [ ] Tax Court [X] Bankruptcy [ ] Orig. Petition / Criminal

District S. Ill., RI Div. Filed in D.C. 11-5-73 Federal Prisoner [ ]
Number RI-BK-73-233 and 234 Notice of Appeal 3-22-76 State Prisoner [ ]
Judge Morgan Type Petition ______

Title: IN THE MATTERS OF:
ONOFRE J. SOTELO and NAOMI SOTELO,
Bankrupts-Appellants.

Appearance	Attorney(s) For Appellant(s) (Appointed On ______)	Address
6/23/76	Bruce L. Balch, 402 1st Nat	l. Bk. Bldg., P.O. Box 66, Rock Is IL 61201

Appearance	Attorney(s) For Appellee(s) (Appointed On ______)	Address
5/22/76	Donald B. Mackay, P.O. Box	375 Springfield, IL 62705
5/22/76	Robert J. Kauffman, P.O. B	ox 209, Peoria, IL 61601
5/24/76	Scott P. Crampton, Asst.	Atty. Gen. Tax Div. D/J.Wash.DC20530
5/24/76	Gilbert E. Andrews, Chief	Appellate Section

(OVER)

Contents of Record Filed 5-3-76
Pleadings: one volumes.
Transcripts: ______ volumes.
Depositions: ______ volumes.
Exhibits: ______
Other: ______

Supplemental Records.

Date	Contents

Miscellaneous

Withdrawal of Record

What Withdrawn	Date	By Whom	Return
1pdgs.,1taps	1/20/77	L.C.	[illegible]

Summary Of Events

Docketed: 5-3-76
Docket Fee Paid: 5-3-76 In Forma Pauperis [ ]
Appendix: ______
Appellant's Brief: 6/30/76
Appellant's Brief: ______
Appellee's Brief: 8/2/76
Appellee's Brief: ______
C.R. [ ] Granted [ ] Denied [ ] AA/I Copies ______
Reply Brief: 8/23/76
______ Brief: ______
Additional Authority ______
Notice of Oral Arg: 10/12/76

Briefs Distributed: [illegible]
Date of Oral Arg: 12/3/76
Panel: J.Bauer,J.Wood,J.Grant
Opinion Date: 3/24/77 Bauer
Order Date: ______
Disposition: REVERSED & REMANDED
Reported At: 551 F2d 1095
Petition For Rehearing: ______
Granted [ ] Denied [ ] ______
Mandate Issued: 4/15/77
Record Returned: 4/15/77

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Docket 76-14

DATE	FILINGS-PROCEEDINGS
6/29/76	Filed 0&3c of appellants motion for ext. of time to file brief and aff.
6/30/76	Entered order that the Clerk file instanter the 25c of appellants brief.
6/30/76	Filed 25c of appellant's brief, per order—svc.
8/2/76	Filed 15c of appellee's brief—svc.
8/9/76	Filed 0 & 3c appellants' motion for extension of time to file reply brief.
8/10/76	Entered Order extending time for appellants' to file brief to 8/26/76.
8/23/76	Filed 15c appellants reply brief—svc.
10/12/76	Entered order setting appeal for oral argument on 12/3/76; 9:30. Oral argument limited to 15 min. per/side
12/3/76	Heard and taken under advisement.
3/24/77	Filed opinion by Judge Bauer.
3/24/77	Entered final judgment order, REVERSING, with costs, and REMANDING.
4/15/77	MANDATE ISSUED
4/20/77	Filed receipt from district court for mandate and record.
6/23/77	Filed notice of filing petition for cert. on 6/17/77. Supreme Ct. 76-1800.

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

RI-BK-73-233/234

MERGED CASES

IN THE MATTER OF

ONOFRE J. SOTELO and NAOMI SOTELO,
BANKRUPTS

NOTICE OF APPEAL TO DISTRICT COURT

Onofre J. Sotelo and Naomi Sotelo, the bankrupts, and the appellants herein, appeal to the above-mentioned District Court from the order of the Bankruptcy Judge entered in this case 23 January 1976 as an order allowing the application of the trustee to pay a $10,000 homestead exemption to the Internal Revenue Service.

The parties to the order appealed from and the names and addresses of their attorneys are as follows:

Representing the appellants herein:

Bruce L. Balch of
Katz, McAndrews, Durkee & Telleen
Attorneys at Law
402 First National Bank Building
P.O. Box 66
Rock Island, IL 61201

Representing the Internal Revenue Service:

Donald B. Mackay, U.S. Attorney
Attn: Robert J. Kauffman,
Assistant U.S. Attorney
Federal Courthouse
Peoria, IL 61601

Representing the trustee in bankruptcy (pro se):

James E. Whitemire, Jr.
105 - 7th Street
Silvis, IL 61282
Dated: 23 January 1976

The above-mentioned appellants

By: /s/ Bruce L. Balch
BRUCE L. BALCH for
KATZ, MCANDREWS, DURKEE & TELLEEN
Attorneys for Appellants
402 First National Bank Building
P.O. Box 66
Rock Island, IL 61201
Telephone: 309/788-5661

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

RI-BK-73-233/234

IN THE MATTER OF

ONOFRE J. SOTELO and NAOMI SOTELO,
BANKRUPTS

NOTICE OF APPEAL

Notice is hereby given that Onofre J. Sotelo and Naomi Sotelo, the bankrupts herein, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the "Decision and Order on Appeal" entered 23 February 1976.

ONOFRE J. SOTELO and
NAOMI SOTELO, Appellants

By: /s/ Bruce L. Balch
BRUCE L. BALCH of
KATZ, MCANDREWS, DURKEE & TELLEEN
Attorneys for Appellants
402 First National Bank Building
P.O. Box 66
Rock Island, IL 61201
Telephone: 309/788-5661

SUPREME COURT OF THE UNITED STATES

No. 76-1800

UNITED STATES, PETITIONER

v.

ONOFRE J. SOTELO and NAOMI SOTELO

ORDER ALLOWING CERTIORARI

Filed October 3, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is set for oral argument in tandem with No. 76-1835.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 250688 98

In The

Supreme Court of the United States

October Term, 1976

No. 76-1800

UNITED STATES OF AMERICA,

Petitioner,

vs.

ONOFRE J. SOTELO and NAOMI SOTELO,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS

Bruce L. Balch
Katz, McAndrews, Durkee & Telleen
200 Cleaveland Building
P.O. Box 66
Rock Island, Illinois 61201
Telephone: (309) 788-5661
Counsel for the Respondents

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1800

UNITED STATES OF AMERICA,

Petitioner,

vs.

ONOFRE J. SOTELO and NAOMI SOTELO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

The respondents respectfully disagree with the statement of the question presented as set forth in the government's brief, and submit that the question presented is more properly stated as:

Whether the personal liability for the penalty assessed under Section 6672 of the Internal Revenue Code is discharged by the bankruptcy of the individual.

STATEMENT

The respondents generally agree with the statement of the case in the government's brief, with the exception of the material in footnote 2 on page 3. Respondents submit that the government's claim for unpaid corporate taxes, proved in the personal bankruptcy and allowed by the bankruptcy court, is a fact needed in the text of the statement.

SUMMARY OF ARGUMENT

The Court of Appeals for the Seventh Circuit correctly held that the personal liability imposed by Section 6672 of the Internal Revenue Code is discharged by the bankruptcy of the individual. The general bankruptcy rule provides that a "discharge shall release a bankrupt from all of his provable debts, whether allowable in the whole or in part, except such as * * *." Bankruptcy Act, Section 17(a). The obligation in this case was a debt that was proved and allowed, so presumptively it is discharged unless it can be shown to come within one of the statutory exceptions to discharge. The government argues two possible exceptions, and respondents submit that neither of them applies here.

A.

One of the exceptions to discharge is found in Section 17a(1) which bars a discharge for "taxes which became legally due and owing by the bankrupt to the United States * * *." Respondents submit that the liability for a tax in this situation is that of the bankrupt corporate employer, not Sotelo personally. The personal liability, although measured in amount by the tax unpaid by the corporation, is not itself a tax from the viewpoint of the individual debtor. The characterization of the obligation is best determined by the words of the statute imposing it, and those words clearly indicate that the personal liability is a penalty, not a tax.

B.

The other exception to discharge argued by the government is Section 17(a)(1)(e) of the Bankruptcy Act which provides that "discharge in bankruptcy shall not release a bankrupt from any taxes * * * which the bankrupt has collected or withheld from others as required by the laws of the United States * * * but has not paid over * * *." Respondents submit that it was the corporation that collected and withheld the amounts in question, and that the bankrupt, as an individual, never collected or withheld any tax as contemplated by the statute.

ARGUMENT

THE PERSONAL LIABILITY FOR THE PENALTY ASSESSED UNDER SECTION 6672 OF THE INTERNAL REVENUE CODE IS DISCHARGED BY THE BANKRUPTCY OF THE INDIVIDUAL.

A. Introduction

This case presents a question of statutory construction involving the dischargeability in bankruptcy of a personal liability for a penalty imposed under Section 6672 of the Internal Revenue Code. The answer is found by the interpretation of the relevant statutes to determine what Congress meant by the words used, since clearly Congress has the ultimate legislative power to compel either result. The respondents therefore deem it unnecessary to answer the introductory arguments of the Government concerning the alleged historical and fiscal significance of this case. The answer is in the statutes, no matter what result is reached.

There is no question that respondent Onofre J. Sotelo was personally liable for the Section 6672 penalty, and that respondent Naomi Sotelo was not liable. The government brief cites a large number of cases dealing with such questions as who is the person liable, what is meant by "willfully," and other matters not relevant to the question of discharging the penalty in bankruptcy. These cases have been collected in Appendix A, *infra*, and each tabulated as to the reason for not being applicable here. Many of these cases appear to have been cited for particular definitional dicta. Respondents submit that such definitions, drawn from cases not involving the immediate question presented, are not applicable here.

B. The Penalty Assessed Under Section 6672 Of The Internal Revenue Code Is Dischargeable In Bankruptcy.

Until the court below decided the case at bar, every reported case considering the dischargeability of the Section 6672 penalty held that it was a non-dischargeable tax. This line of cases originated with *Botta v. Scanlon*, 314 F.2d 392 (C.A.2, 1963) and all the other authorities flow from that case. The plaintiff individuals in that case sought an injunction against the Internal Revenue Service to restrain the collection of the Section 6672 penalty. The court denied the injunction on the authority of Section 7421(a) of the Internal Revenue Code, known as the Anti-Injunction Act, which provides:

> "* * * no suit for the purpose of restraining the * * * collection of any tax shall be maintained in any court * * *."

The plaintiffs argued that the liability under Section 6672 was a "penalty" and not a "tax" and therefore could be enjoined in spite of the Anti-Injunction Act. The answer to that argument is in Section 6671(a) of the Internal Revenue Code which provides:

> "* * * any reference in *this title* to "tax" imposed by *this title* shall be deemed also to refer to the *penalties* * * * provided by *this subchapter*" [emphasis supplied].

The *Botta* court therefore correctly concluded by virtue of Section 6671(a) that "penalty" was equal to "tax" *for the purpose of the Anti-Injunction Act*.

The first case to pass directly on the question of dischargeability was *Sherwood v. United States*, 228 F.Supp. 247 (U.S.D.C., E.D., N.Y., 1964). Based on *Botta*, the court in *Sherwood* concluded that the penalty was a tax, and held that it was non-dischargeable. Without any real analysis or explanation, but merely as an un-

supported conclusion, various other district courts then applied *Botta* as interpreted by *Sherwood* and held the Section 6672 penalty was non-dischargeable. Because all these later cases rest on this same line of reasoning, further discussion of them would serve no purpose.

Besides the case under consideration here. two circuit courts of appeal have passed on this question. Neither of these two decisions contains any explanation for the conclusion reached. The Fifth Circuit, by *per curiam* affirmance, adopted its district court opinion. *Murphy v. Internal Revenue Service*, 533 F.2d 941, affirming 381 F.Supp. 813. The trial judge's opinion in *Murphy* (at 815) makes this observation:

> "* * * the plight of the bankrupt is one that naturally incites sympathy and tends to provoke compassion. The purpose of bankruptcy to give the bankrupt a new start in life and to free him from the burden of his debts is frustrated by a proceeding which does not discharge him from paying taxes created by a corporate enterprise which ended in financial disaster and in his own personal financial ruin."

Despite this language, the district judge felt constrained to hold for non-dischargeability based on *Botta* and *Sherwood*.

The Fourth Circuit based its result on the district court opinion in *Murphy*, and contains no explanation for its reasoning. *Lackey v. United States*, 538 F.2d 592.

The Fourth and Fifth Circuit opinions should be compared to the complete analysis of the question presented furnished by the Seventh Circuit in this proceeding. *Sotelo v. United States*, 551 F.2d 1090 (Pet. App. C, p. 17a). The Seventh Circuit properly analyzed the improper application of *Botta* to the bankruptcy context by pointing out that there is no equivalent in the Bankruptcy Act to Section 6671(a) of the Internal Revenue Code.

The characterization of the liability by the statute itself should be controlling. Section 6672 says "penalty" and does not make the individual directly liable for a tax. While it is understandable why the government would prefer to call this obligation a tax, the best evidence of the nature of a statutory liability is what it is called in the statute creating it. Section 6672 repeatedly stresses the penalty idea by providing that the responsible party "* * * shall, in addition to the other *penalties* provided by law be liable to a *penalty* * * *. No *penalty* shall be imposed under section 6653 for any *offense* to which this section is applicable." [emphasis supplied].

A similar question was passed upon in *United States v. Childs*, 266 U.S. 304, where it was necessary to distinguish between "penalty" and "interest" on a tax claim in a bankruptcy case. The then applicable statute (quoted at 307) provided:

> "* * * there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due."

The government conceded that the 5% addition was a penalty. The court followed (at 309) the characterization of the 1% rate as interest, saying:

> "* * * the Federal statute is precise, and is made peremptory by the distinction between 'penalty' and 'interest' * * *."

As a policy matter, the treatment of the Section 6672 penalty as non-dischargeable leads to horrendous results, especially where a large enterprise experiences a financial reversal. When a person remains liable after a personal bankruptcy for the taxes of that person there is some connection between the amount of the tax liability and the assets that were directly available to that in-

dividual at some point. This nexus is absent when an individual is held liable for the taxes owed by a corporation. The corporate liability could well exceed the present or future resources of the individual. Except for the meager exemptions provided by Section 6334 of the Internal Revenue Code, the future earnings of a hapless debtor could be confiscated forever.

We do not deny that it is within the power of Congress to create such a severe result, but such a drastic conclusion should not be created by statutory construction when a more reasonable interpretation is available. One purpose of the Bankruptcy Act is to grant debtors a fresh economic start and such purpose should be given effect here. The tax collector can take the corporate assets and go on to take the existing assets of the individual. Anything more is peonage.

C. The Bankrupt Individual In This Case Is Not A Person Who "Collected Or Withheld From Others" For The Purposes Of The Bankruptcy Act.

The basis of the decision below was not only the characterization of the obligation as a "penalty" as distinguished from "tax," but also was a recognition that the Section 6672 liability is vicarious in nature. There is no nexus between the income or property of the bankrupt and the "tax" sought to be imposed on him. To avoid this problem, the government alternatively relies on Section 17(a)(1)(e) of the Bankruptcy Act which provides:

> "* * * a discharge in bankruptcy shall not release the bankrupt for any taxes * * * which *the bankrupt has collected or withheld from others* as required by the laws of the United States * * *" [emphasis supplied]

This clause cannot be dispositive of the issue presented. Because the provision is expressly limited to "taxes," the government brief presupposes that the liability under Section 6672 is a "tax," which is the very question involved in the primary argument.

Contrary to the government's position, a literal reading of the quoted section of the Bankruptcy Act leads to the conclusion that it does not apply to the Section 6672 penalty. As stated by the Court of Appeals, "* * * it was not Sotelo himself, but his employer-corporation, that was obligated by law to collect and withhold * * *." Although Section 6672 imposes a personal liability on the individual for the purposes of the Internal Revenue Code, it does not follow that the obligation is the same for the purposes of the Bankruptcy Act.

The legislative history cited by the government is actually supportive of the conclusion that Section 17(a)(1)(e) of the Bankruptcy Act applies to *employer-bankrupts* who fail to remit withheld payroll taxes, but not to *employee-bankrupts* who are held vicariously liable under Section 6672. The committee reports cited in the government brief which deal with Section 17(a) of the Bankruptcy Act as presently in effect do not cover the Section 6672 liability. Congress and the Treasury were only concerned with taxes which were formerly not otherwise dischargeable, but which were made dischargeable by enactment of the three year limitation added to Section 17(a)(1).

The addition of Section 17(a)(1)(e) was only to prevent the discharge of three-year-old unpaid employment taxes owned by a *bankrupt-employer* and not a *bankrupt-employee.* This additional proviso was enacted in response to objections made by the Treasury to a proposal,

which became law, which permitted the discharge of taxes which were due and owing more than three years prior to bankruptcy. Reference to the Treasury's letter to the House Judiciary Committee, as reproduced in the committee report cited by the government, reveals that the Treasury was objecting to the discharge of employment taxes collected by employer-bankrupts only.

> The proposal would thus discharge * * * liabilities resulting not from the bankrupt's failure to pay *his own taxes* but from *his* failure to keep intact money which *he* had obtained from others as a *trustee* for the Government." [Emphasis supplied]. H.R. Rep. No. 2535, 85th Cong., 2d Sess. 6 (1958)

The foregoing report does not refer to the Section 6672 penalty, nor does the following:

> "Again the department is also concerned with the inequity of granting a taxpayer a discharge of *his* liability for payment of trust fund taxes which *he* has collected from *his employees* and the public in general. * * * The department does not believe that it is equitable or administratively desirable to permit *employers* and other persons who have collected money from third parties to be relieved of their obligation to account for and pay over such money * * *." [Emphasis Supplied]. H.R. Rep., No. 372, 88th Cong., 1st Sess. 6 (1963).

We suggest that the relationship between the corporation-employer, the Internal Revenue Service, and the individual corporate officer is analogous to suretyship. The dischargeability of the underlying debt, in this case taxes, is determined by the status of the principal debtor to the creditor. The dischargeability of the obligation of the surety to the creditor, however, does not depend on the nature of the underlying debt. A surety who guarantees child support payments, which are non-dischargeable by virtue of Section 17(a)(7), is entitled to be discharged. *In re Sullivan*, 262 F.574. Sureties who

guarantee fiduciary obligations, which are non-dischargeable under Section 17(a)(4), are similarly discharged. *Jones v. Knox*, 46 Ala. 53, *McMinn v. Allen*, 67 N.C. 131. The liability of a person to pay the taxes of another is dischargeable in bankruptcy. *Duffy v. Collum*, 49 Ga.App. 470, 176 S.E. 41.

The difficulty with the government's position on this issue is the attempt to transplant concepts derived from the Internal Revenue Code and implant them into the Bankruptcy Act. Each of these statutes was enacted for its own peculiar purposes and each must be interpreted in light of its own overall function. The Internal Revenue Code determines who is *liable* for what amounts, as a function of collection. The Bankruptcy Act determines what obligations are *dischargeable* as a function of relief. The creation of a liability by one law and the discharge of that same liability by another is completely harmonious to the purpose of both laws.

The various administrative policy statements cited by the government merely reflect the desire of the Internal Revenue Service to collect the Section 6672 penalty after a bankruptcy. These statements do not overcome the fundamental unfairness of holding an individual perpetually in bondage for a sum which could exceed his total lifetime receipts. Ours is a society in which risk of private capital is admired and encouraged. Although it is essential that government be financed, it is also essential that individuals be permitted to start anew if their personal fortune has been risked and lost. Imposing permanent economic servitude on the unfortunate corporate officer whose employer has failed may well be within the scope of congressional power under Article I, Section 8, of the Constitution; but such a harsh result should not be presumed in the absence of a clear statutory mandate.

CONCLUSION

Because the Government has requested further proceedings in the Court of Appeals, regardless of the decision here, we have attached a separate discussion opposing a remand to the Court of Appeals if that court's decision is affirmed. Appendix B, *infra*. The respondents submit that the judgment of the Court of Appeals for the Seventh Circuit should, in all respects, be affirmed.

Respectfully submitted,

Bruce L. Balch
Katz, McAndrews, Durkee & Telleen
200 Cleaveland Building
P.O. Box 66
Rock Island, Illinois 61201
Telephone: (309) 788-5661

Counsel for the Respondents

APPENDIX A

Tabulation of cases cited in the government brief which respondents submit are not applicable.

Page of Government Brief	Cases Cited	Respondent's Characterization
12	*Adams* v. *United States*, 504 F.2d 73	1
28	*Bob Jones University* v. *Simon*, 416 U.S. 725	3
28	*Braden* v. *United States*, 442 F.2d 342, certiorari denied *sub nom. Bonistall* v. *Braden*, 404 U.S. 912	1
24	*Bruning* v. *United States*, 376 U.S. 358	4
28	*Burden* v. *United States*, 486 F.2d 302, certiorari denied, 416 U.S. 904	2
30	*Cross* v. *United States*, 311 F.2d 90	2
11	*Dillard* v. *Patterson*, 326 F.2d 302	1
25	*Donaldson* v. *United States*, 400 U.S. 517	5
12	*Genins* v. *United States*, 489 F.2d 95	1
12	*Groman* v. *Commissioner*, 302 U.S. 82	6

Page of Government Brief	Cases Cited	Respondent's Characterization
27	*Hamar* v. *Commissioner*, 42 T.C. 867	7
11, 28, 30	*Harrington* v. *United States*, 504 F. 2d 1306	1
11, 30	*Hartman* v. *United States*, 538 F.2d 1336	1, 2
11	*High* v. *United States*, 506 F.2d 755	2
28	*Horwitz* v. *United States*, 339 F.2d 877	1
11, 32	*Kalb* v. *United States*, 505 F.2d 506, certiorari denied, 421 U.S. 979	1
32	*Larson* v. *United States*, 340 F. Supp. 1197	8
28	*Liddon* v. *United States*, 448 F.2d 509, certiorari denied, 406 U.S. 918	1
28, 30	*Monday* v. *United States*, 421 F.2d 1210, certiorari denied, 400 U.S. 821	9
11, 30	*Moore* v. *United States*, 465 F.2d 514, certiorari denied, 409 U.S. 1108	2
12, 30	*Mueller* v. *Nixon*, 470 F.2d 1348, certiorari denied, 412 U.S. 949	1
9, 27-28	*New Jersey* v. *Anderson*, 203 U.S. 483	10
11, 30	*Newsome* v. *United States*, 431 F.2d 742, certiorari denied, 411 U.S. 986	2
9, 28	*New York* v. *Feiring*, 313 U.S. 283	10
30	*Otte* v. *United States*, 419 U.S. 43	10

Page of Government Brief	Cases Cited	Respondent's Characterization
12	*Pacific National Ins. Co.* v. *United States*, 422 F.2d 26, certiorari denied, 398 U.S. 937	1
13	*Slodov* v. *United States*, certiorari granted October 3, 1977 (No. 76-1835)	1
28	*Sonzinsky* v. *United States*, 300 U.S. 506	11
30	*Sorenson* v. *United States*, 521 F.2d 325	2
30	*Spivak* v. *United States*, 370 F.2d 612, certiorari denied, 387 U.S. 980	9
28	*Teel* v. *United States*, 529 F.2d 903	2
10	*United States* v. *American Friends Service Committee*, 419 U.S. 7	12
28	*United States* v. *Butler*, 297 U.S. 1	11
16	*United States* v. *McMullen*, 516 F.2d 917	1
9, 28	*United States* v. *New York*, 315 U.S. 510	10
16	*United States* v. *Patterson*, 465 F. 2d 360, certiorari denied, 409 U.S. 1038	1
28	*United States* v. *Strebler*, 313 F.2d 402	1, 2
12	*Werner* v. *United States*, 512 F.2d 1381, affirming 374 F. Supp. 558	1
31	*White* v. *United States*, 372 F.2d 513	1, 2

Explanation of respondents' characterization of cases cited in government brief:

1. Determination of who is the responsible person under Section 6672. Such citations are not relevant here because Onofre J. Sotelo has been found to be such, and Naomi Sotelo has been exonerated.

2. Question of "willfully" as used in Section 6672. Because Onofre J. Sotelo has been held liable under Section 6672, willfulness is not an issue here.

3. Status of a claim for tax exemption unrelated to Section 6672.

4. Interest on a non-discharged debt is itself not discharged.

5. Rights of an individual in records maintained by another.

6. Corporate reorganization.

7. Certain beneficiaries of an estate are transferees who are liable for an estate tax deficiency.

8. Liability under Section 6672 does not lapse with the death of the individual.

9. Deficiency arising from a compromise with the corporation can be collected from the responsible individual.

10. Priority of a claim for distribution of assets.

11. Constitutionality of a statute determined.

12. Suit barred by Anti-Injunction Act.

APPENDIX B

Position of Respondents on Question of Remand to the Court of Appeals.

The brief for the United States correctly points out in the footnote to its conclusion that the court below did not press on the Illinois homestead question.

The respondents claimed a right of homestead in certain Illinois real estate under Smith-Hurd Ill.Ann. Stat. c. 52, Section 1 (1977 Cum. Supp.). The trustee in bankruptcy sold the property and set aside $10,000 as the Illinois statutory homestead exemption. The Internal Revenue Service later served a levy on the trustee based upon the liability of Onofre J. Sotelo under Section 6672. The question as to whether the homestead money belonged to Naomi Sotelo as the wife or Onofre J. Sotelo as the husband was presented to the bankruptcy judge, District Court, and Court of Appeals.

The Seventh Circuit did not reach homestead issue. In their view, which the respondents submit is correct, it did not matter who owned the homestead. If Naomi Sotelo is the owner, then the levy cannot reach the homestead money because she was exonerated from liability for the claim on which the levy is based. If Onofre J. Sotelo is the owner, the levy was ineffective because he was discharged in bankruptcy prior to the levy.

The Government attempts to avoid the effect of the discharge in bankruptcy, assuming that it applies, by quoting the part of Section 17(a)(1)(e) which provides that "a discharge shall not be a bar to any remedies available under applicable law to the United States or to

any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this title * * *." The quoted portion of the statute, however, must be considered in the context from which it is delivered. It is part of the list of exceptions to the general rule that bankruptcy discharges all provable debts. The proviso which makes exempt property subject to being taken applies only if the underlying liability is properly classified as a tax. This proviso was inserted to supplement the latest amendments which allow the discharge of taxes under certain specified conditions. The purpose of this provision is to permit governments to collect taxes out of otherwise exempt property, even though the tax claim itself is otherwise discharged in bankruptcy.

The result on the merits therefore determines the appropriate form of relief. If the court below is reversed, it becomes necessary to determine who owns the homestead. To the extent it is owned by Onofre J. Sotelo, the government could levy upon it; and to the extent it is owned by Naomi Sotelo, it cannot be reached by levy based on a claim solely against Onofre J. Sotelo. The respondents therefore agree that if the judgment of this court is to reverse the court below, the case must be remanded to determine the homestead ownership.

If this court holds that the obligation of Onofre J. Sotelo under Section 6672 was discharged in bankruptcy because it was not a tax on him, then the right of the Internal Revenue Service to issue a levy would end with the adjudication of bankruptcy. In that case, the ownership of the homestead is immaterial because it cannot be levied upon regardless of ownership.

The existence of this subsidiary issue further points up the need to insulate the post-bankruptcy activities of an individual from a continuing liability under Section 6672. For all practical purposes, to deny a discharge is also to forever prohibit the bankrupt from ever acquiring a home, or any other property exceeding the limitations of Section 6334 of the Internal Revenue Code. The respondents therefore respectfully repeat the conclusion that the judgment below be affirmed.